THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-335
October 2000

50th Anniversary of the UCMJ Series

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The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for $29 each ($36.25 foreign) per year, periodical postage paid at Charlottesville, Virginia and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's School, U.S. Army, 600 Massie Road, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

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The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General Corps electronic reference library and can be accessed on the World Wide Web by registered users at http://www.jagcnet.army.mil.

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Issues may be cited as ARMY LAW. [date], at [page number].

50th Anniversary of the UCMJ Series

Articles

Claims Report
United States Army Claims Service

USALSA Report
United States Legal Services Agency

U.S. Army Trial Defense Service Begins One-Year Test

Editors's Note: This note, and the TJAG comments that follow, were published in the June 1978, The Army Lawyer, to announce that the United States Army Trial Defense Service (USATDS) would begin a one-year test of the USATDS at sixteen installations within the U.S. Army Training and Doctrine Command (TRADOC). The Army Lawyer is pleased to present this note in its continuing series commemorating the Fiftieth Anniversary of the Uniform Code of Military Justice.

On 15 May 1978, the Army will begin a one-year test of the U.S. Army Trial Defense Service (USATDS) at 16 installations within the U.S. Army Training and Doctrine Command (TRADOC). USATDS will be organized as an activity of the U.S. Army Legal Services Agency (USALSA), a field operating agency of The Judge Advocate General, located at Falls Church, Virginia.

Forty-one JAGC officers and three regional defense counsel have been selected by The Judge Advocate General to participate in the test program as defense counsel in the field. A number of criteria were employed during the selection process, including trial experience, retainability, length of active duty, formal certification as a defense counsel, and overall record. All officers will be assigned to USALSA, with duty station at a particular TRADOC installation. Officer evaluation reports will be accomplished entirely within the defense chain of supervision.

Defense counsel will perform duties under the general direction of the Chief, USATDS, and three Regional Defense Counsel, located at Fort, Dix, Benning, and Knox. A Senior Defense Counsel has been designated at each installation who will be directly responsible for all USATDS operations at that post.

Brigadier General Alton H. Harvey, Assistant Judge Advocate General for Civil Law, will provide overall supervision and direction for USATDS operations. The Judge Advocate General has designated Colonel Robert B. Clarke, JAGC, as Chief, USATDS. During the test period, he will be assisted by three other officers assigned to the USATDS staff. Colonel Daniel A. Lennon, Jr., the TRADOC Staff Judge Advocate, has been responsible for initial planning within TRADOC. He and his office will continue to act as the TRADOC primary point of contact and coordination for the test.

Defense services to be provided by USATDS field offices will include representation at all courts-martial, Article 32 investigations, custodial and other pretrial consultations, Article 15 actions, and representation in connection with certain administrative boards. When USATDS counsel are not fully engaged in their primary mission, they will perform other legal duties which do not conflict with their basic defense counsel mission.

As the program progresses, it will be evaluated by commanders, staff judge advocates, USATDS personnel, and others charged with the administration of military justice. At the conclusion of the test, a final report will be submitted to the Chief of Staff.

TJAG's Comments on the USATDS

This is the text of a letter which Major General Wilton B. Persons, Jr., The Judge Advocate General, sent to all Staff Judge Advocates involved in the TRADOC test of the U.S. Army Trial Defense Service.

As we approach 15 May 1978 and the test of the U.S. Army Trial Defense Service (USATDS) in TRADOC, I thought it would be helpful to set forth some of my personal views on the program and the special importance I attach to it.

Establishing a separate defense structure is, of course, an evolutionary concept and must be viewed in that light. After talking to a good many staff judge advocates and commanders, I am convinced that most favor a change in our current method of providing defense services. Objections and concerns relate largely to methods of implementation, supervisory arrangements, matters of support, and relationships between those charged with the responsibility for administering military justice. The test will afford us an excellent opportunity to examine these aspects in detail, determine where our real problems lie, and try alternative methods of operation.

By this time, I am sure you are aware of the basic organizational structure we will be using for the test. I have designated Colonel Bob Clarke as Chief, USATDS. He will report directly to Brigadier General Harvey, who will provide general supervision, much the way he does for the Defense Appellate Division. Senior and Trial Defense Counsel, who will be assigned to USALSA, have been designated at each installation, and the Regional Counsel are already in place. In this regard, one of the principal purposes of the test will be to exercise USATDS organizational channels, but I do not want the USATDS structure, in and of itself, to act as a constraint on a free-flow of information to and from SJAs. For this reason, I urge you to communicate directly with your Senior and Regional Defense Counsel and with the USATDS staff.

While USATDS officer personnel will have a separate rating and supervisory chain, they will remain members of your military community. I encourage you to include them in your

office social functions and other command sponsored activities. USATDS counsel will be required to comply with local directives and policies such as those relating to administration, physical fitness, duty hours, standards of appearance, and the performance of certain extra duties performed by your own judge advocates. Exceptions to these policies—when duty is clearly inappropriate for a defense counsel or where workload requirements preclude compliance—should be rare. Prior to 15 May, you will be furnished a copy of the basic USATDS SOP which sets forth policies and procedures in detail.

Administrative and logistical support arrangements for USATDS offices deserve your special attention. USATDS offices will, as you know, be satellited on installations similar to the way our trial judges are currently supported. In the case of your installation, you will have the additional requirement of supporting a Regional Defense Counsel. We intentionally avoided prescribing support requirements in detail, as these will vary by installation. Some give-and-take between SJAs and Senior Defense Counsel will be necessary in working out these arrangements. I am confident that, through cooperation and full and frank discussion, appropriate support arrangements will be developed at the local level. When agreement cannot be achieved, both the TRADOC and USATDS supervisory personnel will assist in resolution.

During the test, we will be emphasizing the collection and reporting of detailed workload and personnel data, most of which will be a USATDS task. However, as the test progresses, there will be requirements for interim and final after-action reports from both SJAs and commanders. We are developing specific guidance and formats for these and will provide you with instructions at a later date. At the JAG conference in October, I hope to meet with all of the TRADOC SJAs for a preliminary exchange of experiences.

I also encourage you to continue to educate your commanders at all levels on the background of the program and the purposes of the test. USATDS will assist in this effort, but the special relationships and rapport you enjoy with your commanders will make your contribution especially meaningful. Finally, I appreciate the additional responsibility the test will place on you and your office during the coming year. I am certain that with your support the test program will work smoothly. As always, your views and comments will be welcome.

The Lautenberg Amendment: Gun Control in the U.S. Army

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> *"As their children huddle in fear, the anger will get physical, and almost without knowing what he is doing, with one hand he will strike his wife and with the other hand he will reach for the gun he keeps in his drawer. In an instant their world will change."*[1]

The weapon[2] this hypothetical man reached for would not likely have been an Army-issued firearm, and, therefore, this heart-wrenching scenario is no justification for the application of unfettered gun control in the United States Army.

Introduction

For the general population, firearm possession is not a matter of making a living, but a matter of personal choice and convenience. However, for those who serve in our nation's military, possessing a firearm is an integral part of their employment and their livelihood.

For more than thirty years, the Gun Control Act of 1968 (Act) has provided the basic framework for gun control in the United States.[3] Among other things, the Act has always made it illegal for convicted felons to possess firearms or ammunition.[4] However, until recently, the Act provided an exception for members of the government (Government Exception) which entirely waived the Act's prohibitions to the extent the weapons were duty-related.[5] Under this exception, persons in government service at the federal or state levels, such as military and police forces, could carry firearms in the performance of their official duties despite any prior felony convictions.[6] The Government Exception never extended to private, as opposed to government, use of firearms by these federal and state employees.[7]

For nearly thirty years, the status quo prevailed until the enactment of the Lautenberg Amendment (Amendment) on 30 September 1996. Among other changes to the 1968 Gun Control Act, the Amendment increased the scope of the Act's prohibitions to include not only felons, but also anyone convicted of a misdemeanor crime of domestic violence.[8]

In light of the Government Exception, this addition of misdemeanor crimes of domestic violence would not have affected persons in the military, because the Government Exception

1. 142 CONG. REC. S11872-01, S11876 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

2. "Weapon" and "firearm" are used interchangeably in this article. Use of the term "gun" is limited primarily to the term "gun control," out of respect for infantrymen past and present.

3. *See* 18 U.S.C. § 921 (2000).

4. *See id.* § 922(h).

> It shall be unlawful for any person (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; (2) who is a fugitive from justice; (3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug; or (4) who has been adjudicated as a mental defective or who has been committed to any mental institution; to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Id.

5. 18 U.S.C.A. § 925(a) (West 1994).

> (1) The provisions of this chapter shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm or ammunition imported for, sold, or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof. (2) The provisions of this chapter shall not apply with respect to (A) the shipment or receipt of firearms or ammunition when sold or issued by the Secretary of the Army pursuant to section 4308 of title 10, and (B) the transportation of any such firearm or ammunition carried out to enable a person, who lawfully received such firearm or ammunition from the Secretary of the Army, to engage in military training or in competitions.

Id.

6. *Id.*

7. *See id.*

exempted the military from the entire Act for military-issued weapons.[9] However, the Amendment also restricted the Government Exception to make it inapplicable to persons convicted of misdemeanors involving domestic violence.[10] As a result, while the Government Exception still allows persons convicted of any type of felony, including domestic violence, to carry weapons in an official capacity, it no longer applies to persons convicted of domestic violence misdemeanors.[11] Therefore the post-Amendment Government Exception functions in the following way: as to the possession of official weapons, the Act does not apply to government personnel convicted of any offense except for misdemeanors of domestic violence.

A soldier who slaps her husband, who is convicted for simple battery in state court, and who is subsequently released, has possibly been convicted of a "misdemeanor crime of domestic violence," as defined by the Amendment.[12] Accordingly, she may not legally carry a weapon, even in her official capacity as a soldier.[13] However, a soldier who severely beats his wife, who is convicted of a felony, and who is subsequently released, would still be able to carry a weapon legally in the Army under the umbrella of the Government Exception.[14]

Though the Amendment affects law enforcement and military personnel throughout the nation, the cases to date have primarily focused on the Amendment's effects on municipal police forces.[15] In fact, there has been very little published regarding the Amendment in the military context.[16] This article attempts to fill this void in critical analysis by focusing primarily on the Amendment's application in, and effect on the United States Army. While providing a more than superficial analysis of the Amendment, it hopefully provides the Army practitioner with a useful overview of the Amendment.

The scope of this article is limited to consideration of the Amendment's criminalization of the possession of Army-issued weapons used to perform official duties. Previous commentary on the Amendment typically praised the Amendment for prohibiting domestic violence misdemeanants in the military from possessing firearms.[17] However, no commentary to

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8. 18 U.S.C. § 922(d) (2000). "It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . has been convicted in any court of a misdemeanor crime of domestic violence." *Id.*

> It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Id. § 922(g)(9).

9. Had the Government Exception been left intact, the addition of misdemeanor crimes of domestic violence would not have mattered to those in the military because the Amendment excepted those persons from the entire Act. *See* 18 U.S.C.A. § 925(a) (West 1994).

10. *See* 18 U.S.C. § 925 (2000).

> The provisions of this chapter, except for sections 922(d)(9) and 922(g)(9) [misdemeanor crime of domestic violence] and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold, or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

Id. § 925(a)(1).

11. *See id.*

12. The author uses the term "possibly" convicted because the Amendment requires that several conditions be met in order for a conviction to trigger the Amendment. This will be discussed later in the article.

13. The facts of this hypothetical are taken from a real case and are essentially unchanged. *See* Memorandum Replying to Request for Review of Possible Lautenberg Violation Based on SGT Walker's Assignment to Turkey (7 May 1999) (on file at the Office of the Staff Judge Advocate, Administrative and Civil Law Division, Fort Gordon, Georgia) [hereinafter Memorandum One].

14. *See* Hyland v. Fukuda, 580 F.2d 977 (9th Cir. 1978) (holding that the government exception allows a convicted felon currently assigned as an adult corrections officer to carry a weapon); Memorandum, Office of the Staff Judge Advocate (OSJA), Fort Gordon, to Directorate of Human Services, Strength and Management, Fort Gordon, subject: Result of Inquiry (28 June 1999) (detailing the OSJA response as to whether the Amendment mandates this disparate treatment) (on file with OSJA, Fort Gordon, Georgia). Presumably, this bad soldier would not have the opportunity to carry a weapon because he would have been separated from the Army pursuant to *Army Regulation 635-200*, Chapter 14, Conviction by Civil Court. U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED PERSONNEL (26 June 1996) [hereinafter AR 635-200].

15. *See generally* Fraternal Order of Police v. United States, 173 F.3d 898 (D.C. Cir. 1999); Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811 (S.D. Ind. 1998); National Ass'n of Gov't Employees, Inc. v. Barrett, 968 F. Supp. 1564 (N.D. Ga. 1997).

16. *See generally* Ashley G. Pressler, Note, *Guns and Intimate Violence: A Constitutional Analysis of the Lautenberg Amendment*, 13 ST. JOHN'S J. LEGAL COMMENT. 705 (1999); Melanie L. Mecka, Note, *Seizing the Ammunition from Domestic Violence: Prohibiting the Ownership of Firearms by Abusers*, 29 RUTGERS L.J. 607 (1993).

date has noted the important distinction between the personal weapons of military personnel, which the Government Exception never applied to, and those weapons issued by the military for military purposes, which the Government Exception used to exempt but no longer does.[18] This article recognizes this difference and accepts arguendo the validity of preventing domestic violence misdemeanants in the military from possessing personal weapons, but argues that there is no justification for preventing Army personnel from possessing Army-issued weapons to perform official duties.

Implementing the Amendment in the U.S. Army

Overview

The Army's guidance for implementing the Amendment is currently[19] contained in two messages from Headquarters, Department of the Army (HQDA), HQDA I[20] and HQDA II.[21] These messages direct commanders to ascertain which soldiers have Lautenberg Amendment-qualifying convictions.[22] Commanders must assign these soldiers to duties where they do not have to carry weapons, possibly separate them from the Army, and refrain from assigning them overseas.[23] This section considers several different aspects of implementing the Amendment in the Army: first, supervisor determination of Lautenberg-qualifying convictions;[24] second, Office of the Staff Judge Advocate (OSJA) determination that a particular conviction actually qualifies under the Amendment; and third, disposition of soldiers with qualifying convictions.

Supervisor Determination of Qualifying Convictions

There exists no national database of soldiers who have been convicted of misdemeanors for domestic violence and, depending on the state in which the soldier was convicted, it may be the case that records no longer exist. As a result, commanders must use other methods to determine which soldiers might have qualifying convictions. In the case of a soldier who has been convicted since joining the Army, the command is often aware of the conviction.[25] In the case of a soldier who was convicted before entering the Army, the command may never know, especially if the conviction record no longer exists.

Commanders may give soldiers written questionnaires to determine if they have qualifying convictions. However, sol-

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17. *See, e.g.*, Alison J. Nathan, Note, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822 (2000).

18. *Id.* (expending much effort to point out that persons in the military are more likely to commit domestic violence offenses and that the Lautenberg Amendment therefore properly applies to the military).

19. The author uses the term "currently" because, after a period of time, "directives" are typically folded into more comprehensive and less transitory "regulations."

20. Message, 151100Z Jan 98, Headquarters, Dep't of Army, DAPE-MPE, subject: HQDA Message on Interim Implementation of Lautenberg Amendment (11 Jan. 1998) (on file with Headquarters, Department of the Army) [hereinafter HQDA I].

> Commanders will detail soldiers who they have reason to believe have a conviction for a misdemeanor crime of domestic violence to duties that do not require the bearing of weapons or ammunition. Commanders may reassign soldiers to local TDA units where appropriate. No adverse action may be taken against soldiers solely on the basis of an inability to possess a firearm or ammunition due to conviction of a misdemeanor crime of domestic violence if the act of domestic violence that led to the conviction occurred on or before 30 September 1996. Commanders may initiate adverse action, including bars to reenlistment or processing for elimination under applicable regulations against soldiers because of an inability to possess a firearm or ammunition due to conviction of a misdemeanor crime of domestic violence if the act of domestic violence that led to the conviction occurred after 30 September 1996 and after providing such soldiers a reasonable time to seek expunction of the conviction or pardon. This policy concerning adverse action is not meant to restrict a commander's authority to initiate separation of a soldier based on the conduct that led to the qualifying conviction.

Id.

21. Message, 211105Z May 99, Headquarters, Dep't of Army, subject: HQDA Guidance on Deployment Eligibility, Assignment, and Reporting of Soldiers Affected by the Lautenberg Amendment (21 May 1999) (on file with Headquarters, Department of the Army) [hereinafter HQDA II]. While leaving the guidance of HQDA I intact, HQDA II added deployment restrictions for soldiers convicted of Lautenberg-qualifying offenses. *Id.* "All soldiers known to have, or soldiers whom commanders have reasonable cause to believe have, a conviction for a misdemeanor crime of domestic violence are non-deployable for missions that require possession of firearms or ammunition." *Id.*

22. HQDA I, *supra* note 20; HQDA II, *supra* note 21.

23. HQDA II, *supra* note 21.

24. The author uses the term "Lautenberg-qualifying conviction" to mean any conviction for a misdemeanor crime of domestic violence which would qualify under the Act.

25. If a soldier is arrested by the military police (MP), the MPs report the incident to the soldier's command. If a soldier is arrested by local authorities and charged with a crime, the command usually finds out about it because the soldier is either incarcerated or must seek time off of work to respond to the charges.

diers fearful of the adverse effects on their careers may be less than truthful in answering such questionnaires. The Army provided guidance on this point in its first Lautenberg HQDA Message.[26] This message presented two interrelated requirements: (1) commanders will conduct a local unit files check, and (2) soldiers known to have qualifying convictions and soldiers reasonably believed to have such convictions will be reported.[27] While the only specific action required of supervisors is that they "conduct local unit files checks," commanders are also required to report if they "reasonably believe" soldiers have qualifying convictions.[28] "Reasonably believes" sets forth an objective standard. Whether the commander reasonably believes the soldier has a qualifying conviction depends on all the surrounding circumstances. For instance, if a commander hears rumors that a soldier was convicted in the past of a domestic violence misdemeanor offense, the commander may or may not "reasonably believe" the truth of the rumors based on the reliability of the source and the plausibility of the story. It would be prudent in such a situation for the commander to conduct a deeper investigation, to include interviewing the soldier.

OSJA Determination of Qualifying Convictions

Once a commander has "reasonable cause to believe"[29] that a soldier might have a Lautenberg-qualifying conviction, the commander must forward documentation[30] to the local OSJA to determine if the soldier's conviction in fact qualifies as a Lautenberg conviction. Two problems arise here: the Amendment requires that the designation of "conviction" is based on state law,[31] and "domestic violence" is defined broadly.[32]

Regarding the issue of "conviction," a recent case from the OSJA, Fort Gordon, Georgia, illustrates the conundrum this determination can cause.[33] In 1998, a soldier pleaded nolo contendere to a charge of spousal abuse in a Georgia state court.[34] The question presented to the OSJA was whether this nolo contendere plea constituted a "conviction" under Georgia law.[35] The Attorney General of Georgia issued an opinion in a similar case, which indicated that, under Georgia law,[36] the plea of nolo contendere was not a "conviction" for Lautenberg purposes.[37] After reviewing this opinion, the OSJA determined that the conviction did not qualify under the Amendment.[38] That determination, however, only resolved the issue as to one particular kind of conviction in one of the fifty states. Each state has its own domestic law regarding what constitutes a "conviction." In addition, many states have different programs to treat first-time offenders less harshly—so called first offender programs.[39] If a soldier is convicted under the Georgia version of the first offender program, then his conviction does not fall under the Amendment.[40] However, this only applies to Georgia and may not be true of other states.

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26. HQDA I, *supra* note 20, para. 4.

27. *Id.*

28. *Id.*

29. *Id.*

30. This "documentation" usually consists of any records, arrest reports, disposition of proceedings, or whatever other records the soldier may provide to the commander.

31. *See* 18 U.S.C. § 921(a)(20) (2000).

> What constitutes a conviction of a such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Id.

32. Senator Lautenberg recognized the problem with categorization of the crimes as domestic violence. *See* 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

> [C]onvictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence. Therefore, it will not always be possible for law enforcement authorities to determine from the face of someone's criminal record whether a particular misdemeanor conviction involves domestic violence, as defined in the new law.

Id.

33. *See* Memorandum from Terence Cleary, Chief, Administrative and Civil Law Division, Fort Gordon, Georgia, to Commander, Company B, 67th Signal Battalion, Fort Gordon, Georgia, subject: Request for Review of Potential Lautenberg Qualifying Conviction (7 July 1999) (on file with author) [hereinafter Memorandum Two].

34. *Id.*

35. *Id.*

In addition to determining whether a "conviction" actually occurred, a separate issue is deciding whether the offense constituted a "misdemeanor crime of domestic violence."[41] This is addressed by "categorizing" the crime within the statutory definition. Although the statutory language[42] casts a rather wide net, the more difficult task is often gleaning the facts of the crime from the available records. In an illustrative case that came to the Fort Gordon OSJA for review, both the questions of "conviction" and "categorization" were presented.[43]

In that case, available documentation from the county sheriff's office indicated only that SPC P had been "released for time served on a charge of simple battery."[44] The mere fact that a soldier spent time in jail does not mean that he was "convicted" for purposes of the Lautenberg Amendment.[45] Jail time can mean any number of things, for example, pre-trial confinement, or punishment for contempt of court. Furthermore, the clerk of the state court where the action took place was of little help, and simply insisted that, because the soldier had spent time in jail, he must have been "convicted."[46] It was similarly difficult to ascertain whether the victim was in a "domestic relationship" with the soldier such that the Amendment was triggered.[47] The last name of the victim was the same as the soldier's, although it was not clear whether the victim was the soldier's wife.[48] Nevertheless, this example illustrates that it is often difficult to surmise the facts of the case, and to determine

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36. GA. CODE ANN. § 17-7-95 (1999).

> Except as otherwise provided by law, a plea of nolo contendere shall not be used against the defendant in any other court or proceedings as an admission of guilt or otherwise or for any purpose; and the plea shall not be deemed a plea of guilty for the purpose of effecting any civil disqualification of the defendant to hold public office, to vote, to serve upon any jury, or any other civil disqualification imposed upon a person convicted of any offense under the laws of their state.

Id.

37. The First Offender Act, O.C.G.A. § 42-8-60 et seq., is applicable to misdemeanor offenses, Op. Att'y Gen. Ga. 00-1 (Jan. 3, 2000), *available at* http://www.ganet.org/ago/gaagopinions.html.

38. *See* Memorandum Two, *supra* note 33

39. *See, e.g.*, Cheri Panzer, *Reducing Juvenile Recidivism Through Pre-Trial Diversion Programs: A Community's Involvement*, 18 J. JUV. L. 186 (discussing various first offender programs).

40. *See* GA. CODE ANN. § 42-8-60(a).

> [U]pon a verdict or plea of guilty or a plea of nolo contendere, but before an adjudication of guilt, in the case of a defendant who has not been previously convicted of a felony, the court may, without entering a judgment of guilt and with the consent of the defendant [either] defer further proceedings and place the defendant on probation as provided by law or [s]entence the defendant to a term of confinement as provided by law.

Id.

GA. CODE ANN. § 42-8-62(a) adds: "The discharge [after fulfillment of the terms of probation] shall completely exonerate the defendant of any criminal purpose . . . and the defendant shall not be considered to have a criminal conviction." *Id.*

41. *See* 18 U.S.C. § 921(a)(33)(A) (2000).

> [T]he term "misdemeanor crime of domestic violence" means an offense that (i) is a misdemeanor under Federal or State law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

Id.

42. *Id.*

43. *See* Memorandum from Terence Cleary, Chief, Administrative and Civil Law Division, to Commander, Company A, 67th Signal Battalion, Fort Gordon, Georgia, subject: Request for Review of Potential Lautenberg Qualifying Conviction (29 June 1999) (on file with author).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Perhaps this command should have tried to determine the relationship between the soldier and the victim before forwarding the case to the OSJA for legal review. Obviously, the command is in a much better position to ask the soldier outright about his relationship with the victim, as compared with the OSJA that only has an administrative record.

whether there has been a qualifying conviction or a domestic relationship, as defined by the Amendment.

The determination of a qualifying conviction is further complicated by the statute's requirement for satisfaction of specific due process thresholds in order for any conviction to qualify.[49] Accordingly, once the reviewing judge advocate ascertains that the soldier was "convicted" of a "misdemeanor crime of domestic violence," he must then research whether the soldier intelligently waived counsel or a jury trial[50] (if the charged crime provided a right to a jury trial), as required by the Amendment.[51] In addition, the Amendment does not apply if the conviction was expunged or set aside, or if the convicted offender was pardoned for the offense or had his civil rights restored.[52] In misdemeanor proceedings, where the records are less likely to be stored indefinitely, it would be very easy for a soldier to assert that he was never read his rights or that he never intelligently waived counsel.[533] With the relative unimportance of misdemeanor proceedings, it may be difficult to adduce sufficient evidence to disprove the soldier's assertion.

The determination of a qualifying conviction under state law should be easier to make with a new state law database that is "a repository of state law concerning expungement of, or pardons of, misdemeanor criminal convictions, and deferred adjudication."[54] This database is available on the Army's JAGCNET Internet Web site.[55]

Unique Problems of Foreign Adjudication

Many U.S. military personnel are stationed overseas, and the question may arise as to whether a foreign domestic violence conviction is a Lautenberg-qualifying conviction. Pre-Amendment case law generally supports the position that a foreign adjudication of a felony offense could trigger the restrictions of the Gun Control Act.[56] These cases held that the plain language of the statute requiring a felony conviction "in any court"[57] precluded a reading that excludes a foreign adjudication. The Lautenberg Amendment's addition of misdemeanor crimes of domestic violence contains the exact same "in any court" language.[58] However, the very definition of "misdemeanor crime of domestic violence" stipulates that the crime must be "a misdemeanor under Federal or State law . . . ."[59] Therefore, although convictions "in any court" qualify, convictions in foreign courts probably do not trigger the misdemeanor provisions of the Act, because a foreign crime could not be a "misdemeanor under [U.S.] Federal or State law."

Disposition of Soldiers with Qualifying Convictions

All soldiers in the Army must be ready and willing to bear arms in defense of the nation. Therefore, a soldier prohibited from carrying a weapon is not a completely effective soldier. The Amendment does not direct the Army to take specific actions against soldiers with qualifying convictions.[60] Instead

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49. *See* 18 U.S.C. § 921(a)(33)(B)(i) (2000).

> A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and (II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either (aa) the case was tried by a jury, or (bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

Id.

50. In the congressional record, Senator Lautenberg pointed out that this language in the statute about intelligently waiving the right to a jury trial does not have any substantive effect. 142 CONG. REC. S11872, S11877 (daily ed. Sept. 12, 1996). "Of course . . . if an offender was wrongly denied the right to a jury trial, he was not legally convicted. But . . . as it provided needed reassurance to some, I agreed to it in order to facilitate the final agreement." *Id.*

51. *See id*. The odd thing about this requirement is that intelligently waiving counsel or waiving a jury trial would seem to be basic ingredients of any criminal proceeding. This begs the question of why Congress made it an additional element of the statute. Perhaps Congress determined that, in cases involving misdemeanors, the usual mechanism of legal appeal would probably never be pursued, and due process might thereby be neglected.

52. 18 U.S.C. § 921.

53. Apparently Senator Lautenberg was also concerned about this potentiality because he attempted to make it clear that these provisions of the Amendment were of no substantive effect, lest a future court reference back to the legislative history. 142 CONG. REC. S11872, S11877.

54. Office of the Staff Judge Advocate, U.S. Army Reserve Command, *About the Lautenberg All-States Guide Database* (Jan. 8, 1998), *at* http://www.jagcnet.army.mil (Databases, Legal Assistance, Legal Assistance-Lautenberg Guide, Information, General Database Information).

55. U.S. Army Legal Services Agency, *JAGCNET*, *at* http://www.jagcnet.army.mil (last visited Sept. 15, 2000).

56. *See* United States v. Atkins, 872 F.2d 94 (4th Cir. Va. 1989); United States v. Winson, 793 F.2d 754 (6th Cir. Tenn. 1986).

57. *See* 18 U.S.C. § 922(d)(1).

58. *See id.* § 922(d)(9), (g)(9).

59. *Id.* § 921(a)(33)(i).

the Army, implementing Department of Defense guidance, came up with a solution on its own.[61] This solution varies depending on whether the soldier was convicted of a misdemeanor crime of domestic violence before or after the Amendment went into effect.

Soldiers with Pre-Amendment Qualifying Convictions

For soldiers who were convicted of a misdemeanor crime of domestic violence before the Amendment took effect, HQDA I stated that, except for prohibiting the soldier from possessing Army weapons, the commander shall take no other adverse action against the soldier based *solely* on the conviction.[62] The word "solely" here leaves open the possibility of adverse action based on the civilian conviction and some other factor.[63] Moreover, although HQDA I appeared to shield soldiers with pre-Amendment convictions, this protection is more apparent than actual. It is one thing to say that the commander shall take no adverse action, but quite another thing to say that the soldier will not be adversely affected.

All soldiers need to possess a firearm at one time or another. However, a soldier's need for a firearm varies with his particular specialty. On one extreme of the continuum, Army physicians probably have little use for a firearm to perform their daily duties. Therefore, prohibiting the doctor from carrying a firearm,[64] notwithstanding the negative effects of being non-deployable, would probably not adversely affect the doctor's Army career. On the other extreme of the continuum, the infantryman's career revolves around possessing firearms. While it is true that HQDA I prohibited adverse action against the infantryman for pre-Amendment convictions, prohibiting his possession of firearms would serve to "constructively dismiss"[65] him. While not an adverse action, this certainly produces an adverse effect.

The second message, HQDA II, made "constructive dismissal" an actual dismissal in effect. With the exception of a possible one-year extension, HQDA II precluded soldiers with pre-Amendment convictions from otherwise re-enlisting.[66] It also made clear that these soldiers would not be able to attend service schools "where instruction with individual weapons is part of the curriculum."[67] Indeed, the message clarified the true impact of "constructive dismissal" when it stated that: "Commanders will counsel soldiers that the inability to complete service schools may impact on future promotion and affect their career length."[68]

Soldiers with Post-Amendment Qualifying Convictions

In the case of soldiers who committed an act of domestic violence leading to a qualifying conviction after the effective date of the Amendment, 30 September 1996, the Army guidance makes it clear that the commander may "initiate adverse action, including bars to reenlistment or processing for elimina-

60. *See id.* § 921.

61. *See* HQDA I, *supra* note 20; HQDA II, *supra* note 21.

62. *See* HQDA I, *supra* note 22.

63. However, it is unlikely that a soldier would be separated based on a civil conviction that took place several years before, even though the conviction was within the scope of the Lautenberg Amendment.

64. Recall that HQDA I and II make soldiers with qualifying convictions non-deployable, therefore this doctor would not be able to participate in any out-of-country exercises. Obviously, this makes the doctor less useful and could potentially affect the doctor's Army career. *See* HQDA I, *supra* note 20; HQDA II, *supra* note 21.

65. "Constructive Dismissal" is a term that usually arises within the context of workplace discrimination suits to describe the situation where the employer has not actually dismissed the employee, but the work environment has become so oppressive that the employee can no longer remain there. *See* Angela Scott, *Employers Beware! The United States Supreme Court Opens the Floodgates on Employer Liability Under Title VII*, 24 S. ILL. U. L.J. 157, 159 (1999) (giving an example of a constructive dismissal claim in the workplace context). This should not imply that the affected soldier would have a "constructive dismissal" claim against the Army, but only that the adverse effects of taking away a soldier's firearm is something akin to "constructive dismissal," even if the soldier is not technically dismissed.

66. *See* HQDA I, *supra* note 20.

> Soldiers known to have, or those soldiers whom commanders have reasonable cause to believe have, a conviction of a misdemeanor crime of domestic violence may extend if otherwise qualified; however, they are limited to a one year extension. These soldiers may not reenlist and are ineligible for the indefinite reenlistment program. This paragraph does not authorize the extension of soldiers barred from reenlistment based on an inability to possess a firearm or ammunition due to conviction of a misdemeanor crime of domestic violence based on an act of domestic violence occurring after 30 September 1996 where the soldier has been given a reasonable time to seek expunction of the conviction or pardon.

Id.

67. *See* HQDA II, *supra* note 21, para. 4.

68. *Id.*

tion under applicable regulations."[69] This includes elimination for inability to possess a firearm. The directives also provide that commanders must allow soldiers "a reasonable time to seek expunction of the conviction or pardon" before commanders may initiate adverse action.[70] These directives make it clear that the Army prefers soldiers who can carry firearms; soldiers, even long-time soldiers, with qualifying convictions will be without their livelihood.[71]

Rationale Behind the Lautenberg Amendment

Overview

This section considers possible rationales for three aspects of the Amendment. First, this section looks at the existence of the Amendment itself, and ponders Congress's rationale for extending the Act's prohibitions to apply to misdemeanors of domestic violence as well as felonies. Second, this section explores the Amendment's modification of the Government Exception to effectively apply the Act to military personnel for the first time in the history of gun control. Finally, this section considers possible rationales for the Amendment's apparent disparate treatment between domestic violence misdemeanants and felons.

Inclusion of Misdemeanor Crimes of Domestic Violence

According to Senator Lautenberg, the Amendment's namesake, the purpose of the legislation was to close loopholes in state law that allowed persons convicted of domestic violence offenses to have firearms.[72] As discussed in the constitutional review below, retribution does not constitute a permissible rationale for the Amendment.[73] The only legally permissible rationale is to prevent firearms from falling into the hands of those who are more likely to use them to commit domestic violence. Statements in the congressional record indicate that this was one of the motivations behind the Amendment.[74]

Though reasonable people could reach a different conclusion, this article assumes that the Amendment, as applied to the general population, effectively reduces the possibility that firearms may be used to commit domestic violence offenses. Restated, the article assumes that the Amendment prevents firearms from falling into the hands of those who are more likely to use them to commit domestic violence offenses.[75] However, this rationale fails when extended to Army-issued firearms.

The Amendment's Modification of the Government Exception

The justification of preventing civilians from using firearms to commit domestic violence offenses does not apply in the military context. Indeed, with a few narrow exceptions,[76] it would

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69. *Id.*

70. *Id.*

71. *See id.*

72. *See* 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996).

> There is no reason for [people] who beat their wives or abuse their children to own a gun . . . . This Amendment would close this dangerous loophole and keep guns away from violent individuals who threaten their own families, people who have shown that they cannot control themselves and prone to fits of violent rage directed, unbelievable enough, against their own loved ones. The Amendment says: Abuse your wife, lose your gun; beat your child, lose your gun; no ifs, ands, or buts.

Id.

73. Although it would not have been a legally permissible goal, it is still quite possible that retribution is what some members of Congress had in mind in passing this unique Amendment. For instance, one senator stated that "these people [persons with misdemeanor convictions for domestic violence] have already broken the law" 142 CONG. REC. S10379-01 (daily ed. Sept. 12, 1996) (statement of Sen. Murray).

74. *See id.* (stating that "the gun is the key ingredient most likely to turn a domestic violence incident into a homicide. In the face of the reality of domestic violence and the role guns play in homicides in such situations, the Senate cannot allow convicted abusers to have guns").

75. *See id.*

> 65 percent of all murder victims known to have been killed by intimates were shot to death. We have seen that firearms-associated family and intimate assaults are 12 times more likely to be fatal than those not associated with firearms. A California study showed when a domestic violence incident is fatal, 68 percent of the time the homicide was done with a firearm.

Id.

76. One possible exception would be that an MP on patrol duty might sneak off to his house with his service weapon and use it to commit domestic violence. While this seems theoretically possible, no record of such an incident has been found.

be nearly impossible for a service member to use his Army-issued weapon to commit domestic violence, even if that member desired to do so.

To begin with, except for persons involved in actual combat operations or for military police, military personnel typically do not have access to issued weapons on a daily basis. In fact, many service members only possess a service weapon once a year during annual practice and qualification. Furthermore, during this annual qualification, the military weapons are kept under strict control.[77] First, soldiers must check out their weapons from the arms rooms. Next, these soldiers are transported in military vehicles to firing ranges where they fire the weapons. Finally, the soldiers are transported back to the arms rooms where the weapons must be returned. In fact, the Army's control over the weapons is so complete that one Army legal practitioner has stated that "weapons issued in the military remain under the constructive control of the commander during training and deployment missions."[78] Because soldiers are prohibited from taking their weapons home, there exists virtually no possibility that an Army-issued weapon could be involved in an incident of domestic violence.[79] Of course, some may argue that a soldier might sneak his weapon into his car, drive home, and shoot his spouse. However, such a scenario assumes that a soldier will not abide by the law, and fails to recognize that the Lautenberg Amendment, like any other law, may be ignored.[80] Indeed, if a soldier would go through such scheming, to sneak his weapon home, it stands to reason that he would be disposed to get a weapon from another source anyway. In addition, it is worth noting at this point that the unlikely hypothetical outlined above in which a soldier premeditates and deliberates the murder of his spouse is not the type of situation Senator Lautenberg intended the Amendment to address.[81]

Perhaps the most persuasive proof of this proposition is that there is no recently recorded incident of U.S. soldiers having used issued weapons to commit domestic violence.[82] It is significant to note that not even one case involving military personnel using an issued weapon to commit domestic violence was cited in the congressional record or in any of the recent commentaries on the Lautenberg Amendment.[83]

The only rationale offered to justify the Amendment was to keep firearms out of the hands of persons who may use those firearms to commit acts of domestic violence.[84] Certainly if the rationale is anything more than that—for example, to further punish those convicted of domestic violence—then it is an impermissible rationale.[85] However, as it is virtually impossible for a soldier to use an Army-issued weapon to commit an act of domestic violence, there is simply no justification for applying the Amendment to the Army.

Disparate Treatment Between Felons and Misdemeanants

A rather novel rationale has circulated to justify the resulting disparate treatment of felons and misdemeanants under the Amendment.[86] Although this theory is legally insufficient, it nevertheless helps to explain how such disparate treatment came about.[87] Apparently, throughout most of the Amendment's legislative history, the Government Exception was left completely intact.[88] However, in the final moments before the

77. *See* Major John P. Einwechter & Captain Erik L. Christiansen, Note, *Abuse Your Spouse and Lose Your Job: Federal Law Now Prohibits Some Soldiers from Possessing Military Weapons*, ARMY LAW., Aug. 1997, at 25, 29.

78. *Id.* at 29.

79. *See id.*

80. *See* Major J. Thomas Parker, Book Review, *Jurismania*, 158 MIL. L. REV. 179, 187 (1998) (expressing the notion that assigning another law to the books, especially one "irrational" in the military context, will not solve the problem of domestic violence).

81. *See* 142 CONG. REC. S11872-01, S11876 (daily ed. Sept. 30, 1996) (stating that Sen. Lautenberg intended the Amendment to address the situation of sudden anger rather than premeditation and deliberation).

82. It is a difficult task to prove the negative proposition that, in recent history, no soldiers have used their issued weapons to commit acts of domestic violence. However, the author could not find a single reported incident.

83. The author informally coordinated with the Army's official point of contact for Lautenberg questions, Major Douglas Carr, who informed the author that he is also unaware of even one incident where a soldier had actually used his Army-issued weapon in the commission of a domestic violence offense. E-mail from Major Douglas Carr, Headquarters, Department of the Army, ODCSPER, to author (July 16, 1999) (on file with author).

84. *See supra* notes 73-75 and accompanying text.

85. See discussion *infra* under the heading Constitutionality of the Amendment.

86. *See* Mecka, *supra* note 16, at 632-33.

87. Indeed, it would be a legally insufficient rationale because the premise is that the Amendment's disparate treatment was crafted to make the Amendment a ticking constitutional time bomb that would be invalidated on Equal Protection Grounds in the future. *Id.* at 632.

88. *Id.*

bill was enacted, the Government Exception was altered.[89] There is some speculation that the Government Exception was changed by opponents of gun control who hoped that, by removing the exception, the bill would become so unpalatable that it would either fail or be held unconstitutional after passage.[90] However, in light of the extremely negative reaction by gun control opponents to the modification of the Government Exception, this seems more like a speculative conspiracy theory than a valid rationale for the disparate treatment of felons and misdemeanants.[91] Indeed, some pro-gun supporters of the Amendment continued to voice support for the Amendment after it became law.[92]

Perhaps a better explanation for the Amendment's disparate treatment of felonies and misdemeanors is that Congress failed to adequately evaluate that part of the Amendment that modified the Government Exception.[93] Moreover, if Congress had adequately considered this aspect of the Amendment, it may have done away with the Government Exception completely.[94] The statements made by legislators on the congressional record indicate an apparent consensus that the Amendment would prohibit *all* persons convicted of domestic violence offenses from possessing firearms and ammunition without regard to whether the convictions were classified as felonies or misdemeanors.[95]

Constitutionality of the Amendment

Overview

Since enactment of the Amendment, there have been several challenges to its constitutionality.[96] This article focuses on the two arguments that seem to have greatest applicability in the military context,[97] the Equal Protection[98] and ex post facto challenges. Only the Equal Protection argument has achieved even marginal success.[99]

In the military context, there have been no constitutional challenges to the 1968 Act, either prior to or after the Amendment. Of course, prior to the passage of the Amendment in 1996, one would not expect to see challenges in the military context because the Act did not apply to the military as a result of the Government Exception.[100] However, since the Government Exception no longer applies in the case of domestic violence misdemeanor convictions, such constitutional challenges are now possible and likely to arise in the military

89. Robert Suro & Philip Pan, *Laws Omission Disarms Some Police; Domestic Violence Act Has Some Officers Hanging Up Their Guns*, WASH. POST, Dec. 27, 1996, at A16.

90. Ms. Mecka's note indicates that it was Representative Robert Barr who removed the government exception in an attempt to sabotage the legislation. *See* Mecka, *supra* note 16, at 631. However, this allegation seems very odd considering that Representative Barr has spoken out several times in support of the Lautenberg Amendment's treatment of those convicted of misdemeanor crimes of domestic violence. Moreover, Representative Barr has introduced legislation to restore the Government Exception but otherwise leave the Amendment intact. *See* H.R. 445, 105th Cong. (1997). Other opponents of gun control, such as Representative Helen Chenoweth, have sought the outright repeal of the Amendment. *See* H.R. 1009, 105th Cong. (1997).

91. In fact, the Gun Owners of America (GOA) severely criticized Representative Barr for his support of the Amendment. *See* GOA NEWS RELEASE (May 23, 1997).

92. Representative Barr is one such supporter. *See* H.R. 445, 105th Cong.

93. Some statements in the congressional record support this position. For instance, Senator Murray stated: "This Amendment looks to the type of crime, rather than the classification of the conviction. Anyone convicted of a domestic violence offense would be prohibited from possessing a firearm." 142 CONG. REC. S10379 (daily ed. Sept. 12, 1996). Senator Murray's statement only makes sense if she was not considering the existence of the Government Exception, which in fact does look to the classification of the crime, and does allow those convicted of felonies of domestic violence to possess guns so long as they are in government service.

94. *See id.*

95. *See id.* Senator Dodd stated that the Amendment would "prevent anyone convicted of any kind of domestic violence from owning a gun." 142 CONG. REC. S12341-01 (daily ed. Sept. 12, 1996).

96. *See, e.g.*, National Ass'n of Gov't Empls., Inc. (NAGE) v. Barrett, 968 F. Supp. 1564 (N.D. Ga. 1997). The NAGE case represents the standard barrage of constitutional challenges leveled at the Amendment based upon the Commerce Clause, substantive due process grounds, *ex post facto* application, illegal bill of attainder, and the Tenth Amendment. *Id.* at 1572, 1575-77.

97. There appears to be no special grounds that would enhance the plausibility of the above constitutional challenges in the military context. Therefore, this article addresses only the two challenges that have a chance for success in that context.

98. While this frames it as an "Equal Protection" challenge, the reader should keep in mind that this challenge is not based on the Equal Protection Clause found in the Fourteenth Amendment to the U.S. Constitution. *See* U.S. CONST. amend. XIV. However, the concept of Equal Protection found in the Fourteenth Amendment does apply to the federal government as a substantive due process right through the Fifth Amendment. *See* U.S. CONST. amend. V; *see also* Fraternal Order of Police v. United States, 152 F.3d 998 (D.C. Cir. 1998) (citing Vance v. Bradley, 440 U.S. 93 (1971) ("Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws.")).

99. *See Fraternal Order of Police*, 152 F.3d at 998.

100. *See* 18 U.S.C.A. § 925(a) (West 1994); *supra* note 5 and accompanying text.

context.[101] This section surveys several cases in the civilian context that have validated the pre-Amendment and post-Amendment Act. The constitutional challenges presented in these cases, which failed in the civilian context, could possibly succeed in the military context.[102]

Equal Protection Challenges in the Civilian Context

The only Constitutional challenge to the Amendment which has been even marginally successful in the courts thus far has been Fifth Amendment[103] Equal Protection challenges to the Amendment's disparate treatment of felons and misdemeanants.[104] As previously noted, this disparate treatment exists because the Amendment modified the Government Exception such that it no longer exempts misdemeanors of domestic violence, yet still exempts felonies of all types, including those of domestic violence. Proponents of this Equal Protection argument contend that it is irrational to treat domestic violence misdemeanants more harshly than domestic violence felons under the amended Government Exception.[105]

The United States Court of Appeals for the District of Columbia Circuit recently had the opportunity to address this Equal Protection argument in *Fraternal Order of Police v. United States* (*FOP I*).[106] In that case, the Fraternal Order of Police (FOP)[107] asserted that it was an Equal Protection violation to treat those with misdemeanor convictions more harshly than those with felony convictions.[108] The court agreed with the FOP and held the Amendment unconstitutional on Equal Protection grounds.[109] The court determined that, because those with misdemeanor convictions of domestic violence are not a suspect class, the disparate treatment only needs to pass a rational basis review in order to comply with Equal Protection requirements.[110] The court found that Congress did not even have a rational basis for such disparate treatment.[111]

The success of the *FOP I* Equal Protection challenge was short-lived, however. Less than one year later, the same three-judge panel reheard the case because of procedural irregularities in the first decision.[112] In *Fraternal Order of Police v. United States (FOP II*), the court reversed and held that Congress's purpose for passing the legislation satisfied the rational basis standard.[113] In so finding, the court provided one possible legal justification for such disparate treatment.

In *FOP II*, the court quoted the oft-repeated language from *Williamson v. Lee Optical of Oklahoma*[114] as authority for the

101. *See* 18 U.S.C. § 925 (2000); *supra* note 10 and accompanying text.

102. As a side note, the same Commerce Clause power under which Congress passed the original Act should provide sufficient authority for the passage of the Amendment as well. *See* Scarborough v. United States, 431 U.S. 563 (1977) (affirming that the Commerce Clause of the U.S. Constitution provided Congress with adequate authority to pass the 1968 Gun Control Act). However, it should be recognized that the original Act passed during the 1960s when the Commerce Clause was viewed very broadly by the courts. *See* Anthony B. Kolenc, *Commerce Clause Challenges After United States v. Lopez*, 50 FLA. L. REV. 867, 872 (1999). In recent years, the United States Supreme Court has given reason to speculate that a modern interpretation of the Commerce Clause may not adequately authorize Congress to pass such legislation today. *See id.* at 873-76. For purposes of this article, however, the point is moot because the Army is within federal jurisdiction and therefore may be entirely regulated by the federal government. Often when trying to assert questionable authority over the states, Congress resorts to the Commerce Clause. However, this article only considers the application of the Amendment in the military. Even if the Supreme Court were to hold that the Commerce Clause does not provide adequate authority for Congress to legislate over the states in this respect, Congress could still apply this act to the military by virtue of the military's exclusively federal status. Therefore, for purposes of this article, the Commerce Clause challenges are moot.

103. *See supra* note 98.

104. *See Fraternal Order of Police*, 152 F.3d at 998.

105. *Id.*

106. *Id.*

107. The FOP is an association of law enforcement officers that had standing to sue on behalf of police officers potentially injured by the Lautenberg Amendment. *Id.*

108. *Id.* at 1000.

109. *Id.* at 1004.

110. *Id.* at 1002.

111. *Id.* at 1003.

112. *See* Fraternal Order of Police v. United States, 173 F.3d 898 (D.C. Cir. 1999). In FOP I, the FOP only alluded to the issue of the disparate treatment of misdemeanors and felonies as an Equal Protection challenge. The court reheard the case because the judges felt that the government lacked adequate notice of the Equal Protection challenge to effectively form their arguments. *Id.* Judging from its victory in FOP II, the government did form a more convincing argument the second time around.

113. *Id.* at 903-04.

114. 348 U.S. 483 (1955).

rule that Congress is entitled to address a problem "one step at a time."[115] The court explained that Congress may have rationally determined that existing state law already precluded those convicted of felonies from possessing weapons in government service, and therefore Congress only chose to address misdemeanors.[116] Because this Equal Protection challenge arose in the context of the Government Exception, presumably the "state law" the court referred to was state law that already precluded those convicted of felonies employed in the service of state governments from possessing weapons.[117] As the argument goes, the Amendment is rational because it fixes a presumed loophole in state law regulating who in the service of state government may possess weapons.[118] The court further pointed out that this reasoning is buttressed by the fact that Congress have been trying to leave the states free to experiment with regulating the possession of firearms by felons in government service, thereby not imposing federal jurisdiction upon them.[119] Accordingly, the court held that Congress legitimately limited itself to regulating only misdemeanors where it thought the states' actions inadequate.[120]

The court's conclusion in *FOP II* appears to be completely speculative. Indeed, the court cited nothing in the congressional record to support its assertions that Congress considered such arguments.[121] Given the history of rational-basis review, this is not surprising.[122] Nevertheless, the analysis used by the court in *FOP II* to defeat the Equal Protection challenge is even less persuasive in the military context.

Equal Protection Challenges in the Military Context

As previously discussed, the Government Exception is limited to those personnel in the service of government, state or federal. In *FOP II*, the court stated that Congress may have chosen to regulate only misdemeanors, as opposed to both felonies and misdemeanors, to minimize "the scope of potentially intrusive federal legislation [upon state law regulating possession of weapons by state employees]."[123] In other words, Congress may have avoided preempting state law that regulates the carrying of weapons by personnel in the service of state governments. In the Army though, the personnel carrying weapons are in the service of the federal government. Army personnel are governed by federal regulations that have nothing to do with the states, and, therefore, the argument that Congress would have intentionally self-limited its "intrusive federal jurisdiction" with regard to military personnel is not very persuasive. Because the court's rational basis analysis focused largely on the fundamental distinction between federal and state law–making, this rationale becomes significantly less applicable in the context of the military.

An argument can be made that, because state law always governs domestic violence offenses, there really is no distinction between military and civilian offenders. Thus, although the *FOP II* rationale served only to close a state-law "loophole," it should be applied in both the civilian and military context. After all, when the military separates a domestic violence offender, that offender rejoins the rest of the civilian population of the state. However, this argument misses the important, but subtle, fact that disparate treatment between felons and misdemeanants exists only within the context of the Government Exception. Once the Army separates an offender and that offender rejoins the civilian population, the Government Exception no longer applies because that person is no longer in government service. Therefore, the *FOP II* rationale of congressional restraint in the face of state domain cannot be extended to the military context, because only federal law regulates who may carry weapons in the service of the federal government.

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115. *Fraternal Order of* Police, 173 F.3d at 903.

116. *Id.* at 904.

117. *Id.*

118. *Id.* at 903-04. The court added:

> But on reflection it appears to us not unreasonable for Congress to believe that existing laws and practices adequately deal with the problem of issuance of official firearms to felons but not to domestic violence misdemeanants—adequately at least in the sense of explaining how Congress might have found that as to felons the net benefit of federal prohibition (and non-exemption) fell below the net benefit of prohibition and non-exemption as to misdemeanants.

Id.

119. *Id.*

120. *Id.*

121. *See id.*

122. *See* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 14.7 (1999) ("If the classifications arguably relate to a legitimate function of government, the Court will sustain them under the equal protection guarantees.").

123. *Fraternal Order of Police*, 173 F.3d at 905.

While the notion of minimizing federal jurisdiction alone probably would not be enough to constitute a rational basis in the military context, perhaps the loophole-closing function of the Amendment would suffice as a rational basis. Rational basis review constitutes a notoriously low standard.[124] If faced with the military-specific facts, it is not difficult to imagine that a clever court could come up with a rationally based, loophole-closing function that would be suitable in the military context. For instance, a court could find that a loophole exists in the military's current regulations dealing with misdemeanants, but not with felons. The argument could be made that existing military regulations require convicted felons to be separated from the military;[125] however, the regulations do not adequately address domestic violence misdemeanants. Therefore, a loophole exists in the military because domestic violence misdemeanants may possess firearms. The argument could further posit that Congress achieved minimal interference with the military by extending the Amendment's reach only to misdemeanants, thereby closing the loophole where the military's regulations were inadequate. Instead of focusing on the distinction between federal and state jurisdiction as the *FOP II* court did, this argument would buttress the loophole-closing argument with the Congressional desire to limit its interference with the internal disciplinary measures of the military. Although this argument was not set forth in the congressional record for the Amendment, neither was the argument used in *FOP II*.

Ex Post Facto Challenges in the Civilian Context

"An ex post facto law is a measure that imposes criminal liability on past transactions."[126] The Amendment, although only passed in 1996, applies to anyone *ever* convicted of a crime of domestic violence that meets the statutory criteria.[127] This would seem to be an *ex post facto*[128] application of the law in violation of the United States Constitution.[129]

All *ex post facto* challenges to the Amendment thus far have arisen in the civilian context.[130] The courts that have considered the *ex post facto* argument have found that the 1968 Act does not punish behavior that occurred prior to the law, but rather punishes the present act of possession of a firearm.[131] This should not be surprising considering the Act successfully withstood such challenges before the Amendment in the context of persons prohibited from possessing firearms due to pre-Act felony convictions.[132]

When considering the Amendment in the civilian context, the *ex post facto* challenges failed because the Amendment was viewed as serving not to "punish," but rather as a "remedial" measure to keep firearms out of the hands of people who might use them to commit domestic violence offenses.[133] The United States Supreme Court has validated this reasoning, by upholding seemingly criminal, yet actually civil measures that protect the public.[134]

Ex Post Facto Challenges in the Military Context

There has never been an *ex post facto* attack on the Act, either pre- or post-Amendment in the military context. Pre-Amendment cases never arose, because the Act contained the Government Exception that prevented the Act's application to members of the military.[135] However, a post-Amendment *ex post facto* attack on the Act might succeed precisely because the Government Exception no longer applies in the case of misdemeanor domestic violence convictions.

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124. *See* ROTUNDA & NOWAK, *supra* note 122, § 14.7.

125. *See* AR 635-200, ch. 14, *supra* note 14, and accompanying text.

126. *See* ROTUNDA & NOWAK, *supra* note 122, § 15.9.

127. *Id.*

128. "An 'ex post facto law' is defined as a law which prides for the infliction of punishment upon a person for an act done which, when it was committed, was innocent." BLACK'S LAW DICTIONARY 580 (6th ed. 1990).

129. "Art. I, § 9 (Cl.3) and § 10 of United States Constitution prohibit both Congress and the states from passing any *ex post facto* laws." *Id.*

130. *See, e.g.*, Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811 (S.D. Ind. 1998).

131. United States v. Meade, 986 F. Supp. 66 (D. Mass. 1997).

132. *See, e.g.*, United States v. Edwards, 669 F. Supp. 168 (S.D. Ohio 1987).

133. *See* David S. Rudstein, *Civil Penalties and Multiple Punishment under the Double Jeopardy Clause: Some Unanswered Questions*, 46 OKLA. L. REV. 587 (1993) (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984)).

134. *See* Kansas v. Hendricks, 521 U.S. 346, (1997) (holding that Kansas civil confinement of a person with mental abnormalities following the completion of his criminal prison sentence does not violate either double jeopardy or ex post facto notions).

135. *See* 18 U.S.C.A. § 925(a) (West 1994); *supra* note 5 and accompanying text.

Assuming that seemingly criminal measures can serve a valid remedial function, [136] the obvious question becomes what, if any, remedial function the Amendment serves. Applied in the general civilian context, the ostensible answer is that it serves to prevent firearms from falling into the hands of those who may use them in the commission of domestic violence offenses. Removed from the civilian context, however, and put into the controlled environment of the Army regarding issued weapons, this "remedial measure" accomplishes nothing. As stated above, Army-issued weapons are so tightly controlled that they remain under the "constructive control" of the commander at all times.[137] Legislation that precludes those convicted of misdemeanor crimes of domestic violence from possessing military-issued weapons in the course of their training adds nothing to prevent such weapons from being used in the commission of domestic violence offenses.

In the military context, the regulatory function is therefore stripped away, and the only remaining rationale for the Amendment is to twice punish those convicted of misdemeanor crimes of domestic violence, an impermissible rationale. Therefore, it is possible that a challenge to the Amendment *as applied specifically to the military* would be successful. This argument is strengthened by the adverse affect to a soldier's career wrought by the Amendment's application, making the Amendment appear even more punitive, as opposed to remedial. However, as many authors have noted, the Supreme Court has generally given wide discretion to Congress in labeling seemingly punitive measures as civil measures.[138] Commenting on one such case where the Supreme Court validated this method of legislating, one legal scholar explained that the civil measure was "simply a convenient rationalization for the penalty provision in question."[139]

Effect of the Amendment on the Army

Direct Impact on Army Readiness

The actual effect of the Lautenberg Amendment on the Army is not altogether clear. Although the Amendment became law in late 1996, the initial Department of the Army guidance was not published until January 1998.[140] Moreover, subsequent guidance was not published until May 1999.[141] As such, it is difficult to ascertain the actual impact of the Amendment on the Army.

It is doubtful that the Amendment's prohibition on convicted misdemeanants carrying weapons in the military will have a devastating direct effect on Army readiness. In fact, recent figures indicate that less than 0.20% of the Total Army[142] actually fall within the scope of the Amendment.[143] However, this low percentage deceptively misrepresents the negative indirect impact that the Amendment has and will continue to have on Army readiness.

Indirect Impact on Army Readiness

Although it appears that relatively few soldiers fall within the reach of the Amendment, the Amendment creates an undue burden on commanders and supervisors throughout the military. All soldiers identified as being affected by the Army Lautenberg policy must be included in Unit Status Reports and must be reported to Personnel Command.[144] A commander who has reasonable cause to believe that a soldier under his command has a misdemeanor conviction of domestic violence may be guilty of a felony if the commander allows such a soldier to be issued a military weapon for training.[145] If the commander either "knows" or has "reasonable cause to believe" that the soldier may have been convicted of a domestic violence

136. *See* Rudstein, *supra* note 133, at 587.

137. *See* Einwechter & Christiansen, *supra* note 77, at 29.

138. *See* Donald A. Winslow, *Tax Penalties—"They Shoot Dogs, Don't They?"*, 43 FLA. L. REV. 811, 876-77 (1991) (explaining that in the context of fines, the Supreme Court has even interpreted a 50% tax penalty, quite clearly meant to deter behavior, as a compensation to the Government and thus not criminal). *See generally* Janeice T. Martin, *Final Jeopardy: Merging the Civil and Criminal Rounds in the Punishment Game*, 46 FLA. L. REV. 661 (1994) (giving examples of some recent Supreme Court decisions affecting the civil/criminal distinction for double jeopardy analysis).

139. *See* Winslow, *supra* note 138, at 876.

140. *See* HQDA I, *supra* note 20.

141. *See* HQDA II, *supra* note 21.

142. Comprised of the Active Army, Army National Guard, and Army Reserves.

143. *See* e-mail from Major Douglas Carr, Headquarters, Department of the Army, ODCSPER, to author (July 16, 1999) (on file with author).

144. Message No. 99-159, Commander, Personnel Command (PERSCOM), TAPC-PDO-IP, subject: Procedural Guidance on the Reporting of Soldiers Affected by the Lautenberg Amendment (25 May 1999); Message No. 00-10, Commander, Personnel Command (PERSCOM), TAPC-EPC-O, subject: Procedural Guidance on the Reporting of Soldiers Affected by the Lautenberg Amendment (14 Oct. 1999), *available at* http://www-perscom.army.mil/tagd/msg.

145. *See* 18 U.S.C. § 923(d)(9) (2000).

offense, the commander runs the risk of violating the Act if the commander fails to investigate further.[146] While the actual Department of the Army guidance only requires a cursory review of files, if this cursory review reveals anything which would give the commander "reasonable cause to believe," it is possible that the commander will be required to do a more extensive, time-consuming investigation.[147] Therefore, rather than performing other important military duties, an Army commander may now have to act as a private investigator and seek out and scrutinize those soldiers under his command who might have been convicted of misdemeanor crimes of domestic violence.

The *in terrorem* threat of prosecution of the commander may be more apparent than real as this author was unable to find even one instance of someone being prosecuted for issuing weapons, in the civilian or military context, in violation of the Lautenberg Amendment. However, the time-consuming investigative process is not an efficient use of Army resources, and, therefore, it indirectly diminishes Army readiness.[148]

Impact on Recruitment

Tomorrow's Army readiness is tied to today's recruitment. The Amendment has a possible negative effect on recruitment. Enlistment in the Army and in all of the uniformed services is currently far below projected requirements despite great emphasis on recruitment.[149] As a result of the Lautenberg Amendment, the pool of potential recruits has been further reduced. One could argue that those who have been convicted of misdemeanors of domestic violence should not be in the Army anyway. In the case of the habitual wife-beater, few would refute this contention. However, the case is much less clear when, as discussed at the beginning of this article, a female soldier slapped her husband one time and was forever branded with the title of domestic violence misdemeanant.[150] Of course, there are many cases that fall in between these two extremes that might merit individual scrutiny.[151] With that in mind, it is a sweeping generalization to declare that no domestic violence misdemeanants should be in the Army.

The pool of potential recruits for the Army could be even further reduced by the chilling effect of the Amendment. Potential recruits with convictions that fall short of qualifying under the Amendment may be discouraged from applying for military service. In addition, Army recruitment personnel may lose interest in a recruit with a domestic violence conviction, without going through the necessary steps to determine if the conviction actually qualifies under the Amendment. Therefore, the actual and potential effects of the Amendment on the military may far outweigh the potential benefits of the Amendment's application to the military.

Conclusion

In the military context, the Lautenberg Amendment to the 1968 Gun Control Act is irrational, possibly unconstitutional,

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146. *Id.*

147. Previously, the author presented the hypothetical wherein a commander hears a rumor that a soldier has been convicted of a domestic violence misdemeanor offense. Of course, the commander is not obligated to report the soldier if the commander does not "reasonably believe" that the rumor is correct. But even if a commander did not "reasonably believe" the rumor, any responsible commander would want to investigate further, at least by questioning the subject soldier about the rumor. Otherwise, the commander may face a difficult situation if he issues the soldier a weapon only to learn later that the soldier did have a qualifying conviction. As it is a felony to knowingly give possession of weapons to those with qualifying offenses, the commander would be placed in the odd position of having to explain that, even though he was aware of the rumor, he simply disregarded it and did no further investigation. Therefore, some investigative effort by the commander, although not expressly required by the HQDA guidance, is required in practice. This could have a negative effect on Army readiness because it takes the commander away from other important duties.

148. Consider the following warning to commanders and soldiers that appeared on one Army Web site:

> In 1996, Congress passed the Lautenberg Amendment to the Gun Control Act of 1968. The Amendment makes it a felony, pursuant to Title 18, United States Code, Section 922(g)(1), for a person who has been convicted of a misdemeanor offense involving domestic violence to receive or possess firearms and/or ammunition. There is NO military exception to this law! A domestic crime of violence includes a wide variety of misdemeanor offenses, such as assault, threat, which vary under different State criminal codes, but which is generally punishable by less than one year in prison. A soldier, active or reserve, who has such a conviction may not possess, transport, carry or handle individual military weapons or ammunition. If you have such a conviction, you are advised to consult with an attorney to determine whether you can have the conviction expunged from your record. If soldiers who have such convictions do receive or possess individual military weapons or ammunition, they have committed a felony under federal law. Any questions regarding this law may be addressed to the Staff Judge Advocate's office . . . .

Office of the Staff Judge Advocate, 78th Division (Training Support), *The Lautenberg Amendment*, *at* http://www78div.pica.army.mil/sja/lauten.htm (last modified May 29, 1998).

149. *See* Liz Buchannan, *Army Makes Last Push for Enlistees*, OKLA. DAILY, Sept. 29, 1999, *available at* 1999 WL 18815871.

150. *See* Memorandum One, *supra* note 13.

151. For a myriad of different factual situations, all of which qualify as "misdemeanor crimes of domestic violence," *see* Fort Gordon Office of the Staff Judge Advocate, Administrative and Civil Law Division, Lautenberg Opinion File (on file at the OSJA, Fort Gordon, Georgia).

and has the potential to adversely affect Army readiness. The Act should not apply to military personnel that possess military-issued weapons for the performance of their duties. Therefore, the Amendment should be revised, not to fully reinstate the Government Exception, but to provide an absolute exception for military personnel that possess military-issued weapons.

The pre-Amendment Government Exception to the Act completely excluded all persons in the service of "the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof."[152] Many of the Amendments introduced in Congress to deal with the Lautenberg Amendment are attempts to completely restore the Government Exception to its pre-Lautenberg state.[153] However, the original exception was perhaps overly broad in that it exempted from the Act not only the military, but also all government workers, including municipal police forces, who were required to carry firearms in the performance of their duties.[154] The Amendment may make sense when applied to some categories of persons within this very wide group. At the very least, as discussed above, several courts have found the Amendment constitutional when applied in the context of civilian police officers. Therefore, the Government Exception should not be restored to a blanket exception for everyone in government service required to bear arms. Rather, a compromise approach is necessary, one that reconciles the purported need for the Amendment as applied to civilians in government service, while maintaining the exception to ensure the readiness of military personnel.

Such a compromise approach could be accomplished by only slightly modifying the Amendment's statutory language.[155] An obvious advantage gained by carving out a military exception to the Act, is that doing so cures most of the Act's potential constitutional infirmities. In addition, it preserves the Act's application to civilian police officers and others in government service, those with the actual opportunity to use their service weapons in the commission of domestic violence offenses. This proposal satisfies Congress's original intent by keeping firearms out of the hands of those who might use them to commit domestic violence offenses, while permitting firearms to be in the hands of those who are at very low risk of using them against their domestic partners—the military.

152. 18 U.S.C. § 925(a)(1) (2000).

153. *See, e.g.*, H.R. 1009, 105th Cong. (1997).

154. *See* 18 U.S.C.A. § 925(a) (West 1994).

155. This new subsection to 18 U.S.C. § 925(a)(1) should read: "Notwithstanding any other provision of this section, the provisions of this chapter [18 U.S.C. §§ 921 et seq.] shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of United States military personnel in the performance of their official military duties."

The Total Force Concept, Involuntary Administrative Separation, and Constitutional Due Process: Are Reservists On Active Duty Still Second Class Citizens?

John A. Wickham, Esquire

A recent case decided by the U.S. Court of Federal Claims in 1999 exposes the Achilles Heel of the Army's involuntary administrative separation[1] procedures for Reservists on active duty. This case demonstrates a substantial disparity among the military services, where the Army fails to provide the same constitutional due process protections presently afforded other active Reservists. In this new era of the Total Force Concept, where the Reserves and the National Guard are assuming increased active duty roles worldwide, this failure to extend similar due process protections to all service members creates a serious legal inequity.

This article recommends that the Army, as the largest military service, promptly address this due process shortfall by providing the active Reservist equal status under the Constitution within the involuntary administrative separation process. This remedy, neither drastic nor intrusive, simply incorporates the procedural protections already extended to active Reservists by the Air Force, Navy, and Marine Corps.

Major Victor Gonzalez, an Active Guard Reserve (AGR)[2] officer, was part of the Army's full-time mainstay to organize, administer, recruit, instruct, and train the Reserve Component (RC), both U.S. Army Reserve and Army National Guard.[3] After an exhaustive challenge to his involuntary separation from the active duty Army, the U.S. Court of Federal Claims reinstated Major Gonzalez to the AGR on 2 March 1999. The court also awarded Major Gonzalez $123,823.21 in back pay and allowances, and set aside his general discharge imposed on 23 August 1995.[4] Moreover, under the "related case" rules of the Federal Claims Court, the Army presumably deferred to the *Gonzalez* opinion and promptly settled two other administrative discharge cases in April 1999, upgrading both soldiers' discharges to an honorable characterization.[5] On 29 September 1999, the U.S. Court of Federal Claims awarded attorney fees to Major Gonzalez, after finding that the Army's position throughout the underlying dispute was not substantially justified.[6]

Involuntary Discharge of Major Gonzalez

In October 1993, Major Gonzalez tested positive for cocaine use during a drug urinalysis test.[7] On 4 February 1994, court-martial charges were preferred against Major Gonzalez under Article 112a[8] of the Uniform Code of Military Justice (UCMJ). A pretrial investigation was conducted in March 1994, under Article 32, UCMJ.[9] On 31 March 1994, the Article 32 investigating officer (IO) concluded that probable cause existed to believe that Major Gonzalez violated Article 112a and that the case should be referred to court-martial. The IO stated: "[h]owever, in my opinion, there are several questions of fact which may make successful prosecution difficult at court-martial."[10] The IO therefore recommended that some consideration be given to administrative disposition of the case under *Army Regulation (AR) 635-100, Officer Personnel*.[11]

1. Separation, in the context of Reservists, encompasses both release from active duty without discharge (and subsequent transfer to either an Army National Guard or United States Army Reserve component not on active duty) and discharge (the complete severance from all military status). U.S. DEP'T OF ARMY, REG. 635-10, PROCESSING PERSONNEL FOR SEPARATION, glossary (1 July 1984).

2. Active Guard Reserve is defined as:

> Army National Guard of the United States and U.S. Army Reserve personnel serving on active duty under section 12301, title 10, United States Code and Army National Guard personnel serving on full-time National Guard duty under section 502(f), title 32,United States Code. These personnel are on full-time National Guard duty or [active duty (AD)] (other than for training on AD in the Active Army) for 180 days or more for the purpose of organizing, administering, recruiting, instructing, or training the Reserve Components and are paid from National Guard Personnel, Army, appropriations or Reserve Personnel Army, appropriations.

U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES, glossary (21 July 1995) [hereinafter AR 600-8-24].

3. 10 U.S.C. § 12301 (2000); 32 U.S.C. § 502(f) (2000). The Air Force AGR and Navy Training and Administration of the Reserves (TAR) programs fulfill a similar function.

4. Gonzalez v. United States, 44 Fed. Cl. 764 (1999). On 26 January 1999, the court issued final judgment and stipulation of damages. *Id.* The Army did not appeal this decision.

5. Howerton v. United States, No. 97-850C (Fed. Cl. Apr. 19, 1999); Viernes v United States, No. 98-308C (Fed. Cl. Apr. 19, 1999). The author served as plaintiffs' counsel in *Gonzalez*, *Howerton*, and *Viernes*.

6. *Gonzalez*, 44 Fed. Cl. at 770. The Army did not appeal this decision either.

7. *Id.* at 765.

Nonetheless, in April 1994, the convening authority referred the case to trial by general court-martial. On 10 June 1994, the military trial judge found that the charges preferred against Major Gonzalez were defective because a civilian employee, not subject to the UCMJ as required, inadvertently swore to the charges.[12] The judge subsequently dismissed the case "in light of judicial economy and the government's failure to timely correct the preferral deficiencies."[13]

After the court-martial charges were dismissed, the commander of Fort Buchanan, Puerto Rico, took non-punitive administrative action against Major Gonzalez. On 19 September 1994, Major Gonzalez received a memorandum of reprimand (MOR) for the unlawful use of cocaine.[14] The commander did not initiate elimination proceedings under *AR 635-100*, chapter 5, where Major Gonzalez, as a "non-probationary officer," would have been entitled to a formal hearing before a board of inquiry to "show cause" why he should be retained.[15] Although the commander's decision appeared beneficial to Major Gonzalez, the decision actually deprived him of effective due process to contest the drug use charge, and limited him to a cursory right of rebuttal under the MOR procedures.[16]

The MOR procedures permitted Major Gonzalez seven days to submit a written statement to rebut the drug use allegation. In his rebuttal statement, Major Gonzalez asserted his innocence and challenged the drug testing procedures, the credibility of the test results, and the chain of custody of the urine sample. After the rebuttal was submitted, the commander prepared an endorsement for the approving authority, wherein the commander recommended that the MOR be permanently filed in Major Gonzalez's official military personnel file (OMPF). In the endorsement, the commander responded to the issues raised by Major Gonzalez's rebuttal, but the endorsement added derogatory information not mentioned in the MOR. Major Gonzalez was not aware of this additional information, and its potential significance to the approving authority's filing decision, until Major Gonzalez received a response to a Privacy Act request made in 1995. By that time, however, the approving authority had already permanently filed the MOR in Major Gonzalez's OMPF.[17]

On 20 April 1995, a Department of the Army Suitability Evaluation Board (DASEB) denied Major Gonzalez's written appeal to remove the MOR from his OMPF.[18] On 10 July 1995, a Department of the Army Active Duty Board (DAADB) determined that Major Gonzalez would be involuntarily separated from active duty with a general discharge due to the MOR.[19] On 15 August 1995, his appeal of the DAADB decision to the Army Board for Correction of Military Records

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8. UCMJ art. 112a (2000) provides:

> Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court martial may direct.

Id. The substances listed under Article 122(a), subsection (b), include cocaine. *Id.*

9. *Gonzalez*, 44 Fed. Cl. at 765.

10. Administrative Record at 142, Gonzalez v. United States, No. 97-526C (Fed. Cl. July 1, 1998) (Investigating Officer's Report, Department of Defense Form 457, item 22 (Oct. 17, 1997)) [hereinafter Administrative Record].

11. U.S. DEP'T OF ARMY, REG. 635-100, OFFICER PERSONNEL, ch. 5 (officer separation for misconduct) (1 June 1989) [hereinafter AR 635-100], *superseded by* AR 600-8-24, *supra* note 2.

12. Plaintiff's Cross-Motion for Judgment on the Administrative Record at app. 36-7, Gonzalez v. United States, No. 97-526C (Fed. Cl. July 1, 1998) (transcript of Article 39a).

13. *Id.*

14. Administrative Record, *supra* note 10, at 63-64.

15. *See generally* AR 635-100, *supra* note 11. AR 600-8-24 incorporates similar provisions whereby non-probationary Regular Army (RA) and Reserve Component (RC) officers receive a formal separation board of inquiry with right to counsel, confrontation of witnesses, and cross-examination of witnesses. AR 600-8-24, *supra* note 2, ch. 4. Non-probationary officers are RA officers with more than five years active commissioned service, RC officers with more than three years commissioned service, and warrant officers with more than three years service since original appointment in their present component. *Id.*, glossary.

16. *See* U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION, ch. 3 (19 Dec. 1986) (detailing MOR rebuttal procedures) [hereinafter AR 600-37].

17. Gonzalez v. United States, 44 Fed. Cl. 764, at 766. (1999). *See generally* AR 600-37, *supra* note 16, at para. 3.4b(1)(c). Arguably, the addition of derogatory information in presenting the MOR, absent an opportunity for rebuttal, violated AR 600-37.

18. *Gonzalez*, 44 Fed. Cl. at 766; Supplement to Administrative Record at 17-20, Gonzalez v. United States, No. 97-526C (1998) (Fed. Cl. July 1, 1998) [hereinafter Administrative Record Supplement].

19. Administrative Record, *supra* note 10, at 272.

(ABCMR) was denied.[20] On 23 August 1995, Major Gonzalez was involuntarily released from active duty with a service characterization of Under Honorable Conditions (General).[21] His Department of Defense Form 214[22] stated "failure to meet minimum standard of retention," and Major Gonzalez was transferred to the Individual Ready Reserve.[23] Because the Army Reserve did not convene a Reserve board of inquiry under *AR 135-175*,[24] Major Gonzalez remained in limbo without the ability to earn points towards a reserve retirement. He had accrued seventeen years of total military service, including twelve years of active duty. The single MOR, the factual basis of which Major Gonzalez strongly disputed, provided adequate justification to separate him from active Army service, without regard for the due process protections assured by the use of a board of inquiry.

Involuntary Separation of Reserve Officers

Regular Army (RA) officers may demand an adversarial board of inquiry, with a right to consult counsel, prior to involuntary separation under *AR 600-8-24*, chapter 4. These same officers are also afforded an appellate board of review.[25] If the general officer show cause convening authority (GOSCA), Army Personnel Command (PERSCOM), or such other officials as the Secretary of the Army designates, initiates separation pursuant to *AR 600-8-24*, chapter 4, non-probationary RC officers may demand a board of inquiry just like RA officers.[26] Reserve officers may also be separated without a board of inquiry, however, because the GOSCA has discretion in initiating such separations. If elimination is initiated under the provisions of *AR 600-8-24*, chapter 2, an RC officer's separation may be effected without a board of inquiry through the actions of a Department of the Army Active Duty Board (DAADB).[27]

The Army Personnel Command conducts periodic screening of the records of AGR officers to determine if a basis exists for referring the officer to a DAADB for involuntary release from active duty. The GOSCA may also field-initiate their own DAADB referral for reserve officers within their command. Even if the GOSCA withdraws his field-initiated DAADB referral, PERSCOM—and other authorized entities—may still initiate a DAADB referral.[28] The GOSCA has no authority to terminate a DAADB referral from PERSCOM or other authorized initiators. After officers are referred to a DAADB for release, the DAADB renders a final decision on behalf of the Secretary of the Army.[29] There is nothing to prevent the DAADB from proceeding with summary action on behalf of the Secretary of the Army, even in cases where a GOSCA-initiated board of inquiry is pending.[30]

Officers referred to a DAADB are not permitted an adversarial hearing, with due process limited to submitting a written statement replying to the referral recommendation.[31] After reviewing the file and the officer's rebuttal, if any, the DAADB may release an officer from active duty for a variety of adverse reasons, including misconduct, moral or professional dereliction, and substandard duty performance.[32] Although a board of

20. Administrative Record Supplement, *supra* note 18, at 2-7.

21. Administrative Record, *supra* note 10, at 1; Plaintiff's Proposed Additional Facts at para. 4, Gonzalez v. United States, No. 97-526C (1998) (Fed. Cl. July 1, 1998)

22. U.S. Dep't of Defense, DD Form 214, Certificate of Release or Discharge From Active Duty (Nov. 1988). *See generally* U.S. DEP'T OF ARMY, REG. 635-5, SEPARATION DOCUMENTS, para. 1.4 (15 Aug. 1979).

23. Administrative Record, *supra* note 10, at 1.

24. U.S. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS, para. 2.17e (28 Feb. 1987) [hereinafter AR 135-175]. The Commander, Army Reserve Personnel Center, could have initiated separation proceedings against Major Gonzalez, but declined to do so.

25. AR 600-8-24, *supra* note 2, para. 4.17.

26. *Id.* para. 4.18a.

27. *Id.* para. 2.31.

28. Paragraph 2.31(c) provides:

> Local commanders; CDR, PERSCOM; Chief, Army Reserve (CAR); CDR, ARPERCEN; Director, Army National Guard (DARNG); TJAG, or the DACH may recommend that an RC officer be considered by a DAADB to determine if the officer's manner of performance, degree of efficiency, or misconduct constitutes consideration for involuntary separation.

Id.

29. *Id.* para. 2.31a.

30. *See id.* para. 2.31.

31. *Id.* para. 2.31j, tbl. 2-14.

32. *Id.* para. 2.31q.

inquiry is not required, a DAADB determination is required before non-probationary officers can be released from active Army service. Probationary AGR officers, however, may be released without even a DAADB determination.[33] There is generally no entitlement to separation pay for AGR officers, regardless of probationary status.[34]

Although the RC officer may demand a board of inquiry if the GOSCA or other authorized officials initiate separation proceedings pursuant to *AR 600-8-24*, chapter 4, there is nothing preventing these officials from later proceeding with a DAADB referral, thereby denying the RC officer access to an adversarial hearing. Among the services, only Army regulations permit this expedient method to involuntarily separate RC officers from active duty, without the requirement for a board of inquiry and regardless of whether a liberty interest is implicated.[35]

Gonzalez v. United States

In July 1997, as an appeal of the ABCMR denial, Major Gonzalez filed a complaint in the U.S. Court of Federal Claims seeking reinstatement to active duty.[36] On 1 July 1998, the Court of Federal Claims granted summary judgment in favor of Major Gonzalez.[37] In a bench opinion issued swiftly after oral arguments were presented, the court concluded that the Army's summary DAADB procedure violated Major Gonzalez's constitutional liberty interest because it permitted—without a hearing—an administrative separation with a stigmatizing general characterization of service.[38] It is perhaps noteworthy that Judge Margolis stated on the record that he would publish the decision if the Army appealed his decision.[39]

The *Gonzalez* court was the first to interpret the Army discharge case of *Holley v. United States*,[40] which held that a constitutional due process right to a pre-termination board of inquiry does not exist unless there is "some allegation or finding" that the stigmatizing information was false.[41] The Army argued that, although Major Gonzalez claimed his innocence to stigmatizing charges, no right to a hearing existed amid the substantial evidence confirming that Major Gonzalez wrongfully used cocaine. Specifically, the Army asserted that the positive urinalysis test provided sufficient evidence to separate Major Gonzalez without a hearing.[42] The court disagreed, and ruled that an adversarial hearing requirement was triggered under *Codd v. Velger*.[43] Several courts have interpreted *Codd* as requiring a plenary and adversarial, pre-deprivation hearing when some factual dispute has been alleged, including application of rules, polices or law to the particular facts.[44] While Lieutenant Holley essentially sought a hearing only to plead clemency after admitting guilt, Major Gonzalez steadfastly disputed the stigmatizing charges that led to his separation.[45]

The *Gonzalez* court rejected the Army's argument that, because its own regulations did not entitle Major Gonzales to a show cause hearing, such action was a discretionary, internal military personnel decision, not subject to review.[46] The court deferred to its decision in *Casey v. United States*,[47] which held that, even where Army regulations did not grant a right to a board of inquiry, a soldier still had an independent due process right to a board where he raised a material factual question concerning alleged alcohol abuse.[48] The *Casey* decision was consistent with the standards articulated in *Codd v. Velger*.[49] Moreover, Army publications acknowledged that, once a liberty interest was established, administrative due process was governed under constitutional standards formulated indepen-

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33. *Id.* para. 2.29. Active Guard Reserve personnel initially are activated under a limited contract term of four to six years. During that period, the AGR soldier may apply for extended active duty. Probationary AGR soldiers are those serving a one-year probationary period *after* approval of their extended active duty. Under this paragraph, extended active status may be revoked and the officer may be issued an honorable or general characterization of service. *Id.*

34. *Id.* para. 2.31r. *But see* para. 2.31s. The DAADB may also be employed for officer release during a commonly termed Reduction in Force, where officers are considered for separation, not for stigmatizing reasons such as substandard performance or misconduct, but based upon the needs of the service. These Reservists are authorized separation pay. *Id.*

35. *See id.* para. 2.31. It is well established that a stigmatizing administrative discharge will adversely and permanently impact a former service member's civilian employment opportunities and veterans' benefits. *See* Casey v. United States, 9 Cl. Ct. 234 (1985).

36. United States v. Gonzalez, 44 Fed. Cl. 764, 766 (1999).

37. Transcript of June 30, 1998 Bench Opinion Granting Summary Judgment at 47, *cited in Gonzalez*, 44 Fed. Cl. at 766 [hereinafter Bench Opinion].

38. *Id.*

39. *Id.* at 37, 51. Moreover, Judge Margolis indicated that, should the Army appeal, his bench opinion would serve as the published opinion. *Id.* The author, plaintiff's counsel at argument, interpreted the judge's repeated remarks as intending to dissuade the Army from a lengthy appeal while encouraging prompt reinstatement to preserve Major Gonzalez's career after a three year hiatus.

40. 124 F.3d 1462 (Fed. Cir. 1997).

41. *Id.* at 1470 (citing Codd v. Velger, 429 U.S. 624, 627 (1977)).

42. Bench Opinion, *supra* note 37, at 45-46.

43. *Id.* (citing *Codd*, 429 U.S. at 627).

dently by the courts, and not by the process provided by Army regulations.[50]

The *Gonzalez* court also rejected the Army's position that Major Gonzalez's separation certificate did not publicize any stigmatizing information. The Court found the separation justification listed on the certificate, "failure to meets standards of retention," combined with the general service characterizaton, was stigmatizing on its face.[51] Moreover, the certificate identified the separation authority as "AR 635-100 [paragraph] 3-49A."[52] This provision stated that a "general" service characterization is normally issued for "misconduct, moral or professional dereliction."[53] Furthermore, the Army sent a formal letter to Major Gonzalez with an attachment stating that his DAADB selection was based upon "misconduct, moral or professional dereliction" resulting from the MOR indicating wrongful use of cocaine.[54]

The *Gonzalez* court next addressed the Army's assertion that Major Gonzalez's Article 32 hearing had satisfied constitutional due process requirements.[55] The court found that pretrial investigations conducted under Article 32 were designed to determine only whether there is probable cause to refer the charges for trial and to recommend an appropriate disposition of the allegations.[56] Therefore, the Article 32, standing alone, did not satisfy constitutional muster.

Major Gonzalez argued that he was entitled to an adversarial hearing pursuant to both the Due Process Clause and Army regulation. As a non-probationary officer, Major Gonzalez submitted the Army had abused its discretion by not affording him a board of inquiry prior to elimination, as provided in *AR 635-100*, paragraph 5.24 (Initiation of Elimination Actions for Non-probationary Officers). The Army, by providing this regulatory scheme prescribing elaborate safeguards through the board of inquiry process, had already established this forum to guarantee non-probationary officers due process in the face of a stigma-

44. *Codd*, 429 U.S. at 627 ("[T]here must be some factual dispute . . . . Nowhere in his pleadings or elsewhere has respondent affirmatively asserted that the report . . . was substantially false."). *See* Cabrol v. Town of Youngsville, 106 F.3d 101, 107 (5th Cir. 1997) (stating that merely invoking the term "false" in plaintiff's brief without more, is insufficient); Paige v. Cisneros, 91 F.3d 40, 44 (7th Cir. 1996) (stating that where employee went through two full hearings, pleaded confession and avoidance, and where there was no disputed issue of material facts to resolve, constitutional due process claim is too feeble to require hearing); Moore v. Agency for Int'l Dev., 80 F.3d 546, 548 (D.C. Cir. 1996) (stating that the sole purpose of *Codd* hearing is to settle factual disputes between employer and employee); Moreau v. F.E.R.C., 982 F.2d 556, 569 (D.C. Cir. 1993) (stating there must be some factual dispute as to the truth of matters); Woods v. City of Michigan City, 940 F.2d 275, 284-85 (7th Cir. 1991) (stating that where there are no disputed facts, and no disputes about the application of rules, policies or law to particular facts, generally there is no hearing required); Greene v. McGuire, 683 F.2d 32, 34 n.2 (2nd Cir. 1982) (stating there must be some dispute); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 447 n.5, 448 (2nd Cir. 1980) (stating that the defendant's summary motion defeated where questions of disputed fact are raised; factual disputes must await proper resolution by the trier of fact).

45. Major Gonzalez successfully reinstated his top secret security clearance, based on similar challenges and evidence of good military character provided by strong statements from numerous senior officers. Good military character has long been recognized as a powerful defense in criminal drug prosecutions in the military when rebutting positive drug tests in tandem with chain of custody defects. United States v. Vandelinder, 20 M.J. 41 (C.M.A. 1985) (stating character evidence may itself generate reasonable doubt in the fact finder's mind); United States v. Beltz, 20 M.J. 33 (C.M.A. 1985) (stating evidence of good military character can be used in drug prosecutions); United States v. Morsell, 30 M.J. 809 (A.F.C.M.R.1990) (setting aside a drug conviction where defective chain of custody argument supported by good military character defense); United States v. Belz, 21 M.J. 765 (A.F.C.M.R.1985) (setting aside drug-related conviction because judge excluded defense's offer of Officer Effectiveness Reports and affidavits of his superiors attesting to his good military character).

46. Bench Opinion, *supra* note 37, at 38, 41-42. *See* Defendant's Opening Brief at 3-5, Gonzalez v. United States, No. 97-526C (Fed. Cl. July 1, 1998).

47. 8 Cl. Ct. 234 (1985).

48. *Id.* at 242 n.6.

49. 429 U.S. at 627.

50. U.S. DEP'T OF ARMY, PAM. 27-21, LEGAL SERVICES ADMINISTRATIVE AND CIVIL LAW HANDBOOK, para. 13.3b(3) (1 Sept. 1990) (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 536 (1985); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)).

51. Bench Opinion, *supra* note 37, at 43-44.

52. Administrative Record, *supra* note 10, at 1.

53. *Cf.* AR 635-100, *supra* note 11, para. 1.6b(1) (stating that an officer's service normally characterized as general or worse by DAADB for officers released for misconduct, moral or professional dereliction); 1.5b (stating that a General Discharge Certificate is issued because of serious misconduct for which punished).

54. Administrative Record, *supra* note 10, at 176.

55. Bench Opinion, *supra* note 37, at 47-48.

56. *See* United States v. Bramel 29 M.J. 958, 964 (A.C.M.R. 1990) (stating that an Article 32 investigation is a preliminary proceeding, not a trial on the merits, and provides a discovery tool for the accused as to the evidence against him) (citing United States v. Samuels, 27 C.M.R. 280 (C.M.A. 1959)). *See also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405 discussion (1993) (stating that an Article 32 investigation is limited to issues raised by the charges and necessary to a proper disposition of the case, "not to perfect a case against the accused . . . [and] also serves as a means of discovery").

tizing discharge.[57] Major Gonzalez maintained that *AR 635-100* provided a floor of rights to an officer with a liberty interest at stake.[58] By relying on the board of inquiry process, the Army had effectively employed the "balancing test" to decide what process was due to protect an officer's liberty interest.[59]

Absent a board of inquiry, Major Gonzalez argued that the Army's reliance on Article 32 or other proceedings on an *ad hoc* basis raised substantial equal protection concerns.[60] Because the board of inquiry process provides more rights to an officer than an Article 32 investigation, the latter was an inadequate forum to protect Major Gonzalez's liberty interest. The purpose of the board is to afford the officer a full adversarial hearing to "show cause" why he should not be eliminated from the service.[61] After the military makes an initial decision to eliminate based upon evidence of misconduct, the officer is afforded an opportunity to prepare and present a meaningful case as to why he should be retained. The board's findings and recommendation are binding and set a protective floor, such that the Army cannot overrule the board and impose a less favorable outcome for the officer.[62]

In sum, Major Gonzalez asserted that none of the supposed "ample opportunities" offered him were adequate to safeguard his constitutional rights and liberty interest.[63] The Article 32 proceeding, MOR rebuttal process, DASEB, DAADB, and ABCMR[64] were not entrusted as "super-boards of inquiry" making show cause and retention decisions for the Army.[65] These forums, Major Gonzalez urged, failed to accomplish the exhaustive and thorough evaluation provided by a duly appointed board of inquiry.[66]

The *Gonzalez* court agreed with the rationale offered by Major Gonzalez and, as an illustration, highlighted a flaw in the administrative proceedings leading to his elimination to emphasize the need for an adversarial forum. The court found that the Army had compromised Major Gonzalez's MOR rebuttal rights under *AR 600-37*[67] when his commander improperly used an endorsement to the MOR rebuttal submitted by Major Gonzalez to add derogatory information, *post hoc* and *ex parte*. This served to discredit Major Gonzalez's defenses contained in the MOR rebuttal, and only an adversarial hearing could have cured this flaw in the proceeding.[68] [69]

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57. Plaintiff's Cross-Motion for Judgment on the Administrative Record at 22-23, Gonzalez v. United States, No. 97-526C (Fed. Cl. July 1, 1998).

58. *Id.* at 22-25. *See* AR 635-100, *supra* note 11, paras. 5.13-5.29, 5.33-5.48. Similar language is found in the current regulation that provides respondents with the right to counsel, to a hearing, to a personal appearance, to a right to testify and present witnesses, and to cross-examine witnesses. AR 600-8-24, *supra* note 2, at paras. 4.1-4.19. *See also* Casey v. United States, 8 Cl. Ct. 234, 241-43, 242 n.6 (1985) (stating that the soldier had independent constitutional due process right to board where underlying separation code stood for stigmatizing "drug rehab" failure, and where Army had sent stigmatizing letter to soldier listing this reason).

59. Plaintiff's Cross-Motion for Judgment on the Administrative Record at 22, Gonzalez v. United States, No. 97-526C (Fed. Cl. July 1, 1998) (citing Mathews v. Eldridge, 424 U.S. 319, 335-36 (1976)).

60. 10 U.S.C. § 10209 (2000) ("Laws applying to both Regular and Reserves shall be administered without discrimination . . . between Regulars and Reserves.").

61. AR 635-100, *supra* note 11, para. 5.13a(3), app. B, *superseded by* AR 600-8-24, *supra* note 2, para. 4.6 (containing similar language).

62. AR 635-100, *supra* note 11, paras. 5.21b, 5.39b(9), 5.23d(3), 5.28b, *superseded by* AR 600-8-24, *supra* note 2, paras. 4.6-4.17. The officer is entitled to not less than three board members senior in rank, who sit as voting members, with one member sitting as the president. AR 635-100, *supra* note 11, para. 5.37a(1), (2)(b), *superseded by* AR 600-24-8, *supra* note 2, para. 4.7. The board president rules on evidentiary and other matters. A legal adviser is present to render advice to the board as to admissibility of evidence, arguments, motions and any other matter. AR 635-100, *supra* note 11, para. 5.14, *superseded by* AR 600-8-24, *supra* note 2, para. 4.10. If the board recommends elimination, the officer is entitled to a board of review, and to submit a legal brief. The board of review furnishes recommendations to the Secretary of the Army after a thorough review of the officer's entire record, whether or not the officer should be retained. The board may decide to retain the officer when the board of inquiry recommended elimination. AR 635-100, *supra* note 11, paras. 5.26-5.27, *superseded by* AR 600-8-24, *supra* note 2, para. 4.17.

63. Defendant's Response to Plaintiff's Cross-Motion for Judgment on the Administrative Record at 7, Gonzalez v. United States, No. 97-526C (Fed. Cl. July 1, 1998).

64. Instead of ordering a show cause hearing, the ABCMR ignored the broader constitutional concerns raised by Major Gonzalez, and did not examine whether the existing regulatory procedures were adequate. According to standard practice in DAADB cases, the ABCMR narrowly limited its ruling to whether DAADB procedure was properly carried out under the controlling Army regulation, then AR 635-100. Administrative Record Supplement, *supra* note 18, at 5-6 (BCMR finding that DAADB decision to involuntarily separate was proper because procedures under AR 635-100, paragraph 3.49, were followed).

65. Plaintiff's Cross-Motion for Judgment on the Administrative Record at 29-30, Gonzalez v. United States, No. 97-526C (Fed. Cl. July 1, 1998) (citing Dodson v. United States Army, 988 F.2d 1199, 1205-1206 (Fed.Cir. 1993)).

66. *Id.* at 30.

67. AR 600-37, *supra* note 16, at ch. 3..

68. Bench Opinion, *supra* note 37, at 47-48.

69. The ABCMR, in a subsequent administrative proceeding, agreed and set aside the MOR, two non-selections for promotion to lieutenant colonel, and ordered promotion reconsideration. ABCMR Dkt. No. AR1999-029831 (11 July 2000).

Award of Attorney Fees

On 29 September 1999, the *Gonzalez* court awarded attorney fees after finding that the Army's overall position throughout the underlying dispute was not substantially justified.[70] In attorney fee cases, the Court of Federal Claims evaluates whether the government agency's position was reasonable in fact and law.[71] In *Gonzalez*, the court's findings were abundantly clear when it stated: "In short, after considering the entirety of the government's position, this court concludes that this is a case where unjustifiable government actions forced the plaintiff to vindicate his rights through litigation. [The Equal Access to Justice Act] is intended to compensate plaintiffs under just such circumstances."[72] Therefore, the court awarded attorney fees and expenses totaling $16,437.15 to Major Gonzalez.[73]

In an August 1999 article, *the Army Times* reported the impact of *Gonzalez:*

> [S]ources on both the Army Staff and Secretariat said legal officials were surprised by the *Gonzalez* decision, and do not want it to become strong precedent in federal courts . . . . "That's why the Army settled these other two cases [*Howerton* and *Viernes*]," said one senior officer. "They did not want adverse rulings. The whole system of administrative discharge could fold if that happened."[74]

The *Gonzalez* ruling indisputably demonstrated the vulnerability and necessity for reform in the Army's system of administrative separation for RC officers.

Policy Justifications for Reform

In this new era of the Total Force Concept, where Reservists and the National Guard are assuming increasing active duty roles worldwide, the failure to extend a level, legal playing field to all service members raises a serious legal and moral dilemma. "Today, with the smaller Army, I don't think you have a choice but to use National Guard units," stated Representative Ike Skelton, ranking member on the United States House Committee of Armed Services.[75] Currently, RC units comprise fifty-four percent of the fighting force while the active Army is only forty-six percent.[76]

A modern military force, drawn from increasingly reluctant civilian volunteers, cannot afford the Army's departure from fundamental constitutional principles for its RC officers. This is especially evident in light of the military's celebration of the fiftieth anniversary of the Uniform Code of Military Justice and its ascension among the respected jurisprudence of criminal law.

For example, provisions of the National Defense Authorization Act for Fiscal Year 2000 show the depth of concern among lawmakers about recruiting problems and the personnel shortage.[77] "We are at the edge of despair [said one Congressional aide] . . . [where] nothing is rejected out-of-hand as an unreasonable approach [to recruiting and retention]."[78] Patrick T. Henry, the Army's Assistant Secretary for Manpower and Reserve Affairs, expressed alarm about a recruiting slump that shows no signs of abating. Claiming a need to portray a better image to the public, the Assistant Secretary stated that "America has to understand that we are not an employer of last resort . . . . [Rather,] folks should be enthusiastically embracing the young people who want to join the Army, be it for the education, adventure, lifestyle or a standard of living they can be proud of."[79]

In today's military, with the regular force more reliant than ever on part-time soldiers to fulfill critical missions, a "better image" must extend to the treatment of both AGR and activated Reservists. It may be argued that it promotes readiness to quickly eliminate problem RC officers, particularly the AGR officer who trains and administers RC units. However, this is a

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70. Gonzalez v. United States, 44 Fed. Cl. 764, at 765 (1999).

71. *See* Equal Access to Justice Act, 28 U.S.C. § 2412(b), (d) (2000); Pierce v. Underwood, 487 U.S. 552, 565 (1988).

72. *Gonzalez*, 44 Fed. Cl. at 770.

73. *Id.* At 771.

74. Jim Tice, *Lawsuits Settled In Ousted Soldiers' Favor*, ARMY TIMES, Aug. 6, 1999, at 22.

75. Steven Komarow, *National Guard Facing Mission Impossible?*, USA TODAY, Sept. 13, 1999, at 24A.

76. *Id.*

77. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65 §§ 571-574 (options to improve recruiting for Army Reserve), 581 (survey of military members on why they are leaving the service), 586 (members under burdensome personnel tempo), 113 Stat. 614-615, 622-624, 633-634, 637-639 (1999).

78. Rick Maze, *Congress On Edge Of Despair Over Recruiting Retention, Recruiting*," A.F. TIMES, Aug. 13, 1999, at 13.

79. Jane McHugh, *Army Rolls Out Big Guns To Boost Recruiting,* ARMY TIMES, Aug. 30 1999, at 22.

luxury the Army can ill afford amid the modern Total Force Concept with its critical reliance on RC volunteers. Moreover, the second-class treatment of RC officers—and particularly non-probationary AGR officers—facing involuntarily separation from active duty undoubtedly portrays an image that America's now vital citizen-soldiers are unworthy of basic due process.

Proposed Remedy

Neither the Air Force nor the Navy provides a distinct involuntary release process for career RC officers. Instead, even probationary officers are subjected to a screening board that determines whether a hearing is appropriate in particular cases.

Air Force Approach

The Air Force effectively affords all of its active duty officers minimum constitutional due process. Moreover, analysis of Air Force procedures reveals that similar protections are extended to RC officers.[80] Officers "entitled" to a show cause hearing by a board of inquiry include non-probationary officers, probationary officers if recommended for a discharge under other than honorable conditions (OTH), and officers accused of homosexual conduct.[81]

Prior to March 2000, for probationary officers not facing an OTH discharge recommendation, the Air Force provided constitutional safeguards through a screening board process conducted by either the Probationary Officer Discharge Board (PODB) or the Air Force Personnel Board (AFPB).[82] The show cause authority (SCA) referred an officer's case to a PODB if recommended for a general discharge, or directly to the AFPB if recommended for an honorable discharge.[83] In the former, the PODB reported its findings and recommendations for an honorable or general discharge back to the SCA, who then referred the case to the AFPB.[84] On 10 March 2000, the Air Force eliminated its PODB, although this change did not alter the reserve Air Force officer's right to a board of inquiry.[85] Instead, the change was intended "solely to streamline and speed up processing time" by combining review into a single board, the AFPB.[86] The due process rights previously extended under the PODB—including judge advocate review and recommendation to convene a hearing—are now combined at the AFPB level.[87]

Under current Air Force guidelines, the AFPB operates as the initial review directly from the SCA, and the board is given wide latitude to recommend to the Secretary of the Air Force the following options: honorable or general discharge, return the case for a board of inquiry or take "proper action [after] determining that unusual circumstances warrant different procedures."[88] Finally, staff judge advocate (SJA) involvement, and other appropriate examination of legal issues raised by the officer, occur during this process.[89]

Navy and Marine Corps Approach

The Navy's discharge procedures for RC officers serving on active duty are less explicit than the Air Force procedures. However, the Navy does not impose a distinct separation process for RC officers analogous to the Army's DAADB system.[90] The Navy officer administrative separation regulation begins by declaring that the policies and provisions therein,

80. U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-3206, ADMINISTRATIVE DISCHARGE PROCEDURES FOR COMMISSIONED OFFICERS, para. 4.33 (19 June 1998) (concerning discharges for cause) [hereinafter AFI 36-3206]. *See generally* U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-3207, SEPARATING COMMISSIONED OFFICERS, ch. 3, Involuntary Separations (1 Sept. 1996).

81. AFI 36-3206, *supra* note 79, attach. 1, terms (A non-probationary officer is (1) a regular officer with five or more years of active commissioned service, computed from the total active federal commissioned service date; or (2) a reserve officer with five or more years of commissioned service, computed from the total federal commissioned service date). All reserve officers are automatically considered for regular status by their promotion selection boards for the rank of Major. Failure to be selected for regular status does not subject these career Air Force Reservists to an analogy of the Army's DAADB, however. *See id.*

82. *Id.* chs. 5, 6.

83. *Id.* para. 4.32.

84. *Id.* paras. 5.7, 5.8.

85. Telephone Interview with Nancy Baker, Air Force Officer Separations, Randolph Air Force Base, Texas (July 21, 2000). Ms. Baker co-authored the recent changes to AFI 36-3206. *Id. See* Major General William A. Moorman, Air Force 2000 TJAG Annual Summary, Address Before the American Bar Association Standing Committee on Armed Forces Law (July 8, 2000).

86. Telephone Interview with Nancy Baker, *supra* note 84.

87. *Id.*

88. AFI 36-3206, *supra* note 79, para. 6.4.

89. *Id.* paras. 1.2 (role of SJA), 4.14 (Commander's Responsibilities), 4.22 (Delegating Administrative Actions), 4.26 (SCA determinations), 6.3 (officers or their counsel may appear before AFPB proceedings if necessary under the circumstances).

"apply to all officers and warrant officers of the Regular and Reserve components of the Navy and Marine Corps."[91]

Non-probationary Navy and Marine Corps officers, those officers with five or more years of commissioned service, are "entitled" to an administrative separation board.[92] Although the Navy's administrative board procedures are intended for regular commissioned officers, the Secretary of the Navy "may refer any case which he or she considers it appropriate, to an administrative board."[93] In addition, probationary officers are "entitled" to an administrative board of inquiry if discharged or released for misconduct or moral or professional dereliction.[94] Thus, Navy procedures for officer separations implicitly provide minimum constitutional due process to RC officers separated for recognized stigmatizing reasons.

Proposed Remedy for the Army

The Army can maintain the integrity of its current procedural framework by formally adding a screening tool to guide the GOSCA and DAADB. Whether deciding to provide the RC officer with a board of inquiry, or to proceed directly with DAADB disposition, this new regulatory requirement must explicitly delineate legal review tasks at both the GOSCA and DAADB levels.[95] This would require modifications to existing regulatory language.[96] Some sort of independent, legal recommendation is already implicitly necessary under Army guidance.[97] However, the current Army regulations do not mandate a legal review in each case to determine whether a board of inquiry is required to ensure effective due process.

In GOSCA-initiated actions, the formal legal review and recommendation should be focused towards a *Holley* standard or one that ensures a similar level of analysis of the facts and law.[98] The legal criteria for recommending a board of inquiry should be comparable to that currently offered by the Air Force's AFPB process. That is, an RC officer would not be entitled to a hearing in cases limited to substandard or ineffective performance of duty when recommended for honorable characterization of service, because such cases do not involve a stigmatizing discharge.[99] In addition, RC officers that admit the underlying allegations also would not be entitled to a hearing.[100] Nevertheless, in all cases, the RC officer should be afforded a copy of the legal review.

The legal recommendation should not be legally binding on the GOSCA. This would allow GOSCA-initiated DAADB referrals to proceed despite the legal recommendation. However, a GOSCA decision to convene a board of inquiry and terminate its own DAADB referral must be binding on any later Department of the Army-initiated action to independently recommend an officer for summary DAADB release. This precaution will avoid conflicts with the administrative double jeopardy provisions of *AR 600-8-24*, paragraph 4.4. Therefore, when an RC officer is retained after a separation hearing, that officer will not be subject to later DAADB action for the same reasons, except as permitted pursuant to *AR 600-8-24*, paragraph 4.4(c).

In the event the GOSCA decides to deny a hearing, or where another Department of the Army entity initiates the DAADB referral, the RC officer must be entitled to request an adversarial hearing when submitting their case before the DAADB. As at the GOSCA level, a formal legal review should be conducted to determine whether a board of inquiry is required to ensure effective due process, and the RC officer should be afforded a copy of the legal recommendation. This legal review at the DAADB level would operate as a final due process check in all cases.

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90. U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 1920.6A, ADMINISTRATIVE SEPARATION OF OFFICERS (21 July 1990).

91. *Id.* para. 4a.

92. *Id.* encl. 1.

93. *Id.* encl. 4.

94. *Id.* Probationary naval officers are not entitled to an administrative board in cases of substandard performance or parenthood. *Id.*

95. For DAADB referrals from PERSCOM regarding Reservists, and DAADB referrals from Army Reserve Personnel Command regarding AGR officers.

96. *See, e.g.*, AR 600-8-24, *supra* note 2, paras. 2.31.i, j, tbl. 2-14 (defining current GOSCA actions in DAADB cases, where—if a GOSCA supports a DAADB action—he forwards it to Commander, PERSCOM); ch. 4 (eliminations), para. 4.18d (granting commanders the discretion to initiate UCMJ action or initiate elimination proceedings); tbl. 4-1, step 10 (GOSCA discretionary action after reviewing officer's election of options).

97. U.S. DEP'T OF ARMY, PAM. 27-21, ADMINISTRATIVE AND CIVIL LAW HANDBOOK, ch. 13 (Administrative Due Process), para. 13.2 (Is There A Right to Due Process?), para. 13.3 (What Process Is Due?) (18 Sept. 1990).

98. *See* Holley v. United States, 124 F.3d 1462 (Fed. Cir. 1997); cases cited *supra* note 44.

99. *Cf.* Walters v. United States, 37 Fed. Cl. 215 (1997) (stating that there is no hearing right prior to DAADB release for substandard duty performance).

100. *See Holley*, 124 F.3d at 1464 (allegations of misconduct admitted).

Corresponding amendments should follow to the language of *AR 600-8-24*, paragraph 2.31j. The current language in paragraph 2.31j states that the initiating GOSCA need only "consider the [RC] officer's rebuttal and either close the case . . . or forward the case with the officer's rebuttal to the [DAADB]." The amended provisions should state:

> The initiating GOSCA will consider their legal advisor's due process analysis, including the advisor's factual findings and legal recommendation. A copy of the legal advisor's findings and recommendation will be furnished to the respondent officer. The initiating GOSCA will also consider the officer's statement of rebuttal. The GOSCA will then decide to: close the case; initiate elimination proceedings pursuant to paragraph 4.18d; or forward the action to Commander, PERSCOM, for DAADB consideration. In cases where the officer is retained after a GOSCA-initiated elimination proceeding, the officer will not be subject to subsequent DAADB action for the reasons underlying the GOSCA-initiated separation, unless the requirements of paragraph 4.4 are satisfied, and such DAADB action is approved by the Secretary of the Army.

Similar amendments should be made to the language of *AR 600-8-24*, paragraph 2.31g, and table 2-14. However, the references to the GOSCA above should be replaced with DAADB, or Commander, PERSCOM, as appropriate.

Requiring formal legal review at the GOSCA level would ensure adequate due process to the RC officer, while preserving the GOSCA's discretion to choose the separation forum. Past institutional practice reveals confidence in the GOSCA's ability to seriously consider judge advocate advice when confronted with making the right decision for the good of the service member and the Army. Adding a formal legal review and recommendation at the DAADB level would complement the GOSCA-level legal review, and serve as a final due process check for separation cases initiated at both the GOSCA and PERSCOM levels. To drive home the larger policy concerns, pre-command courses could emphasize this process with relevant and succinct legal education. Moreover, expert legal instructors could convey the importance of weighing the Army's interest in immediately separating compelling cases without inviting litigation, while respecting the Total Force Concept, public perception, and the volunteer force.[101]

The Army need not adopt the Air Force's expansive but prudent system for releasing RC officers. Nor should the Army adopt the Navy's mandate that extends hearings to all officers, regardless of recommended service characterization, in cases of misconduct and moral or professional dereliction. Rather, the Army can formally incorporate the recommended legal review framework into the existing GOSCA and DAADB processing steps. This will effectively fill the gaping hole in due process protections now left to Army RC officers that face a "stigmatizing" separation.[102] These reforms would require the least amount of bureaucratic change, while shielding the Army's administrative separation procedures from most due process challenges.

Since *Gonzalez*, informal legal reviews probably occur routinely at the GOSCA and DAADB levels. However, the lack of any regulatory requirement for legal review creates uncertainty in the process. This shortcoming also diminishes the awareness of GOSCAs' of the vital importance of ensuring constitutional due process for soldiers under their command. The current approach is apparently intended only to assist the non-lawyer GOSCA and DAADB members in sorting through any complicated legal issues. The legal review is not formally structured, nor is it designed to guide the GOSCA and DAADB in determining whether due process considerations dictate a board of inquiry or allow summary DAADB action.

Instructive on the issue of formal legal review are the facts in *Gonzalez*, where the Article 32 IO evaluated the evidence and issued a recommendation on disposition of the charges. The IO cautioned the convening authority that questions of fact dictated a recommendation for disposition through the administrative show cause process. However, the Army cannot rely on this type of *ad hoc* process, nor is it necessary that a GOSCA convene the equivalent of a formal and cumbersome Article 32 proceeding, or an Air Force PODB equivalent, every time the GOSCA wants to separate a Reservist. Nevertheless, in the Article 32 context, the IO recommendation still constituted a legal recommendation and findings of fact that Major Gonzalez fortuitously relied upon to later claim his right to a hearing under *Codd*,[103] and to successfully set aside his involuntary release.

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101. Moreover, since 1995, the Army has added over seventy-five full-time Reserve JAG positions to its AGR ranks, which is consistent with the parallel 20% increase in overall AGR force. *See generally* Deborah R. Lee, Assistant Secretary of Defense for Reserve Affairs, Statement Before the Readiness Subcommittee, Senate Armed Services Committee (March 21, 1996) (detailing proposed increased numbers of RC personnel).

102. *See* Holley v. United States, 32 Fed. Cl. 265, 275 nn.9, 11 (1994); Rogers v. United States, 24 Cl. Ct. 676, 684 n.14 (1991); Casey v. United States, 8 Cl. Ct. 234, 241 (1985); Keef v. United States, 185 Ct. Cl. 454, 467-69 (1968); Harrison v. Bowen, 815 F.2d 1505, 1518 (D.C. Cir.1987). *See also* Nishitani v. United States, 42 Fed. Cl. 733 (1999) (assuming that a reservist medical officer on active duty had protected liberty interest when clinical privileges revoked and honorably released); Clark v. Widnal, No. 94-Z-455 (D.C. Colo. 1994) (stating that an activated RC medical officer's termination from civilian residency training affected a protected liberty and property interest), *rev'd on other grounds* 51 F.3d 917 (10th Cir. 1995).

103. Codd v. Velger, 429 U.S. 624 (1977).

A formal legal review process would resolve the primary question left unsettled in *Howerton*[104]—whether the bare facts constitute an admission of guilt supported by substantial evidence. In the absence of any prior agency findings of fact involving these alleged admissions, Captain Howerton faced no barrier to arguing that he met the *Codd* test of making at least a "colorable" allegation that the stigmatizing information was false.[105] A prior agency finding, whether by formal legal review at the GOSCA or DAADB levels, or both, would limit the Army's exposure to later civil suits challenging the separation due to the highly deferential legal standards applied to agency fact finding.[106] Instead of deferring to the courts, this returns the predicate fact finding process to the Army for these discretionary military matters. At present, the Army openly invites the courts to determine de novo whether the record reveals an admission of guilt or an issue of fact regarding stigmatizing allegations against separated RC officers.

Conclusion

The Total Force Concept relies on the RC officer as an ever-increasing element in meeting real-world military missions. As the current Assistant Secretary of Defense for Reserve Affairs has commented, the word "reserves" should now be rephrased as a force composed of people who "re-serve" on a continual basis—including five Presidential call-ups since the Cold War ended.[107] During this period when the Reserves and National Guard are assuming increased active duty roles worldwide, equivalent due process protections should be extended to RC officers facing involuntary administrative separation.

Although the *Gonzalez* bench opinion was unpublished, constitutional due process arguments that contest involuntary administrative separations are not moot or novel. In fact, established precedent suggests that Army reform is inevitable, whether motivated from within or as collateral to the next successful lawsuit.[108] In *Gonzalez*, the Army was unable to articulate a reasoned explanation for departing from standard due process norms.[109] This shortcoming, along with the statutory ban on discrimination between regular and reserve service members,[110] compels the Army to erase the constitutional due process inequities in its RC administrative separation process.

104. Howerton v. United States, No. 97-850C (Fed. Cl. Apr. 19, 1999).

105. *Id.*; Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 447 n.5, 448 (2nd Cir. 1980) (stating that a summary motion defeated where questions of disputed fact are raised; disputes must await proper resolution by the trier of fact).

106. *See* Heisig v. United States, 719 F.2d 1153, 1156 (Fed. Cir. 1983) (stating that the courts should not reweigh the evidence that was considered, but rather determine whether the board's conclusion was support by substantial evidence).

107. Charles L. Cragin, Assistant Sec'y of Defense for Reserve Affairs, *Demise of the Weekend Warrior*, THE OFFICER, Aug. 1999, at 38. This is the official publication of the Reserve Officer Association of the United States.

108. *See* Natural Res. Def. Counsel v. S.E.C., 606 F.2d 1031 (D.C. Cir.1979) (stating that although statute did not mandate specific substantive rule, agency's failure to adopt certain rule-making procedures held judicially reviewable). The published attorney fee opinion in *Gonzalez*, drives home this message. Gonzalez v. United States, 44 Fed. Cl. 764, at 770 (1999).

109. *Cf.* Vietnam Veterans v. Sec'y of Navy, 843 F.2d 528, 539, (D.C. Cir.1988) (stating that although Department of Defense memorandum requiring uniform discharge standards had no binding effect, agency must articulate a reasoned explanation for any departure or reversal from standard norms).

110. 10 U.S.C. § 10209 (2000).

Tort Claims Note

Manual Defense Finance and Accounting Service (DFAS) Payments

The Defense Finance and Accounting Service-Rome, New York, has been prohibited from continuing its past practice of allowing U.S. Army offices to use the Standard Financial System (STANFINS) to transmit payment reports for payment. Additionally, the Computerized Accounts Payable System for Windows (CAPS-W) system is not usable by claims offices due to computer system differences. As a result, the U.S. Army Claims Service (USARCS) and DFAS-Rome, New York, agreed that effective 1 May 2000, a *Manual DFAS Payment Procedure* would be followed for the payment of claims. The USARCS was the first participant under the new manual DFAS payment system. By July 2000, all claims offices were under the new system. The system applies to all Army claims offices processing claim payments through DFAS-Rome, to include Hawaii and Puerto Rico.

These Army claims offices will no longer make electronic claim payments under STANFINS or CAPS-W. Additionally, manual payments other than those outlined under the new agreement will not be permitted. Accordingly, participating claims offices will process all applicable DFAS payments manually via fax to DFAS-Rome, New York. These procedures, however, do not apply to claim payments submitted to Financial Management Service, Department of Treasury, the Army Central Insurance Fund, or the Corps of Engineers.

All participating claims offices were provided a copy of a standard operating procedure (SOP) that contains all required instructions and amended payment reports. Under the SOP, claim payments will be submitted via fax to DFAS-Rome using a fax cover sheet in a format provided by DFAS-Rome along with a completed payment report. Standard Form 1034, Public Voucher for Purchases and Services other than Personal, will no longer be used for payment of a claim. The cover sheet will serve as a transmittal sheet listing all claims submitted to DFAS-Rome for payment. Along with the transmittal sheet, a copy of the payment report for each claim to be paid will be provided. The version of the payment report used will depend on the type of claim payment, personnel or tort, being made.

If the claimant requests payment to an account other than an account in the claimant's name, such as to the attorney's escrow or trust account, the claimant must forward a written request to do so. Additionally, if the claimant desires that the claim payment be transmitted by electronic means, the claimant must submit Standard Form 3881 (ACH Vendor/Miscellaneous Payment Enrollment Form) or provide a voided check from the claimant's bank account.

Some of the pertinent changes under the new manual DFAS payment system include:

> (1) The claims officer will sign the payment report as the "Certifying Officer." Certifying is defined in 31 U.S.C. § 3528(a) as the act of attesting to the legality, propriety and correctness of the payment report.
>
> (2) A full fund cite will be reflected on the payment report, rather than the four-digit codes presently used.
>
> (3) The social security number (SSN) or tax identification number (TIN) of the payee will be entered on the payment report. On a joint payment being made to the claimant and his attorney, the claimant's SSN or TIN will be entered, but not the attorney's.
>
> (4) Joint payments to more than one claimant are not allowed. One payment report will be prepared per claimant receiving payment, even though the claimants filed jointly.
>
> (5) The contract number entered on the payment report will be comprised of the acronym JAG, followed by the claims office three-digit office code, a dash, a two-digit current fiscal year code, and the claims office full claim number. For example, a fiscal year 99 claim would be identified as JAGCO1-0099CO1T111.

The DFAS-Rome's intent under this new procedure is to have the payment uploaded to the disbursement system no later than four working days after receipt of the faxed transmittal cover sheet and payment report from the submitting claims office. Approximately three days after the payment has been entered into CAPS-W by DFAS-Rome, a claims office will be able to query STANFINS Redesign-1 (SRD-1) or a web site to get a "come-back" copy of the payment report.

The above procedures do not change the requirement for claims offices to maintain a copy of all payment documents in the claims file. Any questions arising after claims offices receive the new SOP may be addressed to Ms. Joanne Roe at the USARCS budget office, or, if they are tort claim specific, to Mr. Kenneth R. Roberts of the Tort Claims Division. Mr. Roberts and Ms. Roe.

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental law database of JAGCNET, accessed via the Internet at http://www.jagcnet.army.mil.

Retain Records for Power Generating Plants

The United States is involved in litigation concerning the compliance status of several private electric utility coal- and oil-fired boilers.[1] As part of the proceedings, the defendants have requested certain materials pertaining to federal government compliance of similar units. The Department of Justice (DOJ) is working to narrow the scope of the discovery request, but recently requested that installations with coal- or oil-fired electric generating units preserve all documents related to the compliance of these units with the Clean Air Act[2] and its regulations. This request applies to documents in paper and electronic form. Examples of records to be preserved include inspection reports, Environmental Compliance Assessment System findings, stack test results, and other records required to be kept under permit conditions and regulations. As the utility litigation is expected to be lengthy, installations should accumulate the appropriate records and prepare files to facilitate responding to possible future information requests. Installation environmental law specialists should ensure that air program specialists understand that these files are to be preserved until further notice. Copies of the request from DOJ and a memorandum from the Department of Defense directing installations to retain these records can be obtained from ELD by sending an e-mail to richard.jaynes@hqda.army.mil. Lieutenant Colonel Jaynes.

Requirements Clarified for Clean-Up Orders

The Army must occasionally conduct inspections and obtain samples on the property of neighbors to determine if contamination at Army installations has migrated off-post. The President's authority to do so is set out in section 104(e) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[3] and has been delegated to both the Environmental Protection Agency (EPA) and the Army. Under certain circumstances, federal agencies can seek a judicial order to compel the cooperation of private landowners.[4]

A recent district court case has clarified the requirements for judicial orders. In *United States v. Tarkowski*,[5] the EPA sought a judicial order to enter land behind defendant's home "to implement response actions in response to the release or threat of release of hazardous substances," and to bar defendant from interfering with those actions. Later in the litigation, the government submitted a modified motion asking for a more limited right to enter the property.

The court noted that it had to determine three issues before issuing an order: whether the EPA had a reasonable basis to believe that there may be a release or threat of a release of a hazardous substance; whether the EPA's request for access was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; and whether defendant had interfered with the EPA's access to the property.[6]

The court found that EPA established that there were low levels of pesticides and other chemicals in defendant's soil consistent with consumer use.[7] The court concluded, however, that the statute does not provide an exception to the "reasonable basis" standard of section 104(e) for releases resulting from consumer use of products, and that it likewise did not provide an exception to that standard for *de minimis* concentrations.[8]

The court found that EPA's request for investigation went "vastly" beyond what would be considered reasonable given

1. *See, e.g.*, U.S. v. Alabama Power Co., 1999 Extra LEXIS 54 (N.D. Ga. 1999) (DOJ initiated lawsuits against seven Midwestern and southern utility companies.).

2. 42 U.S.C. §§ 7410–7642 (2000).

3. *Id.* § 9604(e).

4. *See id.* § 9604(e)(5)(B)(i).

5. No. 99 C 7308, 2000 U.S. Dist. LEXIS 7393 (N.D. Ill. May 30, 2000).

6. *Id.* at *3.

7. *Id.* at *3-*4.

8. *Id.* at *4.

the evidence presented that releases of hazardous substances into the environment had occurred. It therefore found the EPA demand to be arbitrary and capricious.[9]

With respect to the EPA's second request made during the litigation, the court found that there was no evidence that the defendant had refused it.[10] A landowner must refuse a request or otherwise interfere with the federal agency before a court will issue an order for compliance.

The government apparently argued that the court did not have jurisdiction over the issue because the EPA was conducting a CERCLA removal action.[11] The court did not reach this issue since it was faced not with review of the EPA action per se, but rather with the narrow question of whether the requested order was proper.[12]

There are two lessons here for practitioners. First, be sure to document reasonable requests for entry and inspection under CERCLA section 104(e). This will later allow you to establish the element that consent was not granted or that interference occurred. Second, be sure that the evidence reasonably justifies the action sought. The DOJ prepares complaints for these orders, usually through the local United States Attorney's office. There is a prescribed format for the required litigation report, available from the ELD. Lieutenant Colonel Howlett.

New Resource on Economic Benefit Available

The issue of whether the EPA can or should collect penalties intended to recapture economic benefit from federal facility violators remains a hotly contested matter between the EPA and the Department of Defense (DOD). Army installations have found that the EPA often uses economic benefit as well as size of business[13] penalties to inflate the size of the penalties it seeks. In addition, the EPA often refuses to disclose its penalty calculations, which obfuscates the EPA's use of these "business penalties" during settlement negotiations with Army installations. The EPA also resorts to"inflate and then stonewall" tactics in an attempt to conclude a settlement with a substantially larger penalty than what would be achieved by negotiating based on gravity of the offense factors alone. Consequently, installations must be vigilant in guarding against these tactics and in opposing them when the EPA Regions attempt to apply them.

Many objections are being raised in response to the EPA's new enforcement strategy against federal facilities that showcases economic benefit as its centerpiece. The ELD has published several articles addressing this topic in previous editions of *The Environmental Law Division Bulletin*.[14] A more recent argument provides that "[t]he economic benefit component of a civil penalty should not apply to federal agencies, particularly as calculated by the deficient methodology used in the EPA's BEN[15] model."[16] No federal environmental statute expressly defines the term "economic benefit." The EPA describes "economic benefit" variously as "represent[ing] the financial gains that a violator accrues by delaying or avoiding . . . pollution control expenditures" and "the amount by which a defendant is financially better off from not having complied with environmental requirements in a timely fashion."[17] The key to benefit recapture in cases where a polluter delays or avoids compliance is the EPA's presumption that "financial resources not used for compliance . . . are invested in projects with an expected direct economic benefit to the [violator]."[18] According to the EPA,

9. *Id.* at *8. The demand for entry or inspection cannot be "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 9604(e)(5)(B)(i).

10. *Tarkowski*, 2000 U.S. Dist. LEXIS 7393, *7.

11. Presumably, the argument was that jurisdiction was limited by CERCLA §113.

12. *Tarkowski*, 2000 U.S. Dist. LEXIS 7393, *3.

13. Size of the business penalties are a surcharge (typically 50%) added to economic benefit and gravity-based penalties to ensure that wealthy violators feel the deterrent sting of enforcement. The amount of this type of penalty is based on the capital assets of the business that are presumed available to be sold or mortgaged to raise funds for environmental compliance or penalties.

14. *See* Major Robert J. Cotell, *Show Me the Fines! EPA's Heavy Hand Spurs Congressional Reaction*, ENVTL. L. DIV. BULL., Oct. 1999, at 1; Lieutenant Colonel Richard Jaynes, *EPA's Penalty Policies: Giving Federal Facilities "The Business,"* ENVTL. L. DIV. BULL., Sept. 1999, at 6.

15. BEN is the computer model used by EPA to calculate the economic benefit component of an administrative civil penalty. See OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVIRONMENTAL PROTECTION AGENCY, BEN USER'S MANUAL 1-1 (Sep. 1999) for detailed information about the model, its underlying theories of economic benefit, and its calculation methodology.

16. Jacqueline Little, "Stop the Insanity!" EPA's BEN Model and its Application in Enforcement Actions Against Federal Agencies (2000) (unpublished LL.M. thesis, George Washington University) (on file with author). Lieutenant Colonel (LTC) Jacqueline Little, the newest member of ELD's Compliance Branch, completed the Masters of Law (LL.M.) program in environmental law at George Washington University. In partial satisfaction of the requirements for the LL.M., LTC Little wrote her thesis on the subject of EPA's BEN model and its application to federal facility enforcement actions. The Air Force has posted LTC Little's thesis on its FLITE Internet database. The environmental law section of FLITE is accessible via the Internet at http://envlaw.jag.af.mil and is available to DOD environmental legal specialists. Those interested in obtaining the thesis can also request a copy by sending an e-mail to LTC Little at Jacqueline.Little@hqda.army.mil.

17. Little, *supra* note 16, at 4.

"this concept of alternative investment–i.e., the amount the violator would normally expect to make by not investing in pollution control–is *the basis* for calculating the economic benefit of noncompliance."[19] Since the concept of alternative investment does not apply to federal agencies, generally, there appears to be no basis for recapturing economic benefit in cases involving federal facility noncompliance.

Benefit recapture in the federal agency arena "improper[ly] interfere[s] with the missions assigned to and funds allocated for federal agencies by Congress"[20] and, therefore, constitutes bad policy. Because the payment of the EPA-imposed penalties effectuates a return to the U.S. Treasury of dollars disbursed by it to support federal agency missions, mission accomplishment is necessarily impeded. Such money shuffling is appropriate when it functions as a deterrent measure to ensure that facility managers reorder priorities in order to achieve environmental compliance. However, economic benefit penalties, by seeking to "recover a net financial gain that does not exist" fail to serve as a deterrent and, instead, "serve only to degrade federal missions."[21] It is unlikely that Congress intended such a result.

The EPA has asserted that, in cases of federal agency noncompliance, economic benefit accrues to the "federal government as a whole," with the Department of Treasury acting as the "surrogate holder of the benefit."[22] The EPA bases this position on its 1999 memorandum entitled "Guidance on Calculating the Economic Benefit of Noncompliance by Federal Agencies."[23] This "guidance" document identifies the source of economic benefit in federal facility cases as the interest saved on unissued Treasury notes. If it is indeed the federal government or the Treasury that reaps the alleged benefits of a federal facility's noncompliance, the EPA's position is arguably invalid.

Is it legal for the EPA to recover economic benefit from the federal government? Environmental statutes authorize the EPA to regulate federal departments and agencies—not the federal government as a whole. Clearly, the EPA can collect noncompliance penalties only from those over which it has regulatory power—that is, "departments, agencies, and instrumentalities." If no economic benefit accrues to these entities, however, the EPA cannot legally include such benefit in penalties assessed against either individual facilities or the departments or agencies that oversee them. On the other hand, since the "federal government as a whole" is not subject to the EPA regulation under federal environmental laws, it is not liable for penalties of any kind. In short, the EPA's position appears to leave the agency without a violator from whom it can properly collect the economic benefit it so desperately seeks.

Does the policy disgorge the alleged benefit or does it allow the recipient of such benefit to profit twice? If the Treasury is the federal government entity that ultimately benefits from federal agency noncompliance, the EPA's position guarantees that the Treasury "benefits" twice—first, by avoiding the costs associated with paying interest on notes that should have been issued to fund pollution control projects; and, second, by collecting inflated penalty payments from federal facilities that failed to complete such projects in a timely manner.

The overriding factor in the EPA's analysis of why economic benefit and the BEN model apply to federal agencies is its belief that, without exception, Congress and the President have directed it to treat federal agencies the same as any other member of the regulated community. However, in its attempts to treat federal facility violators "just like" private sector polluters, the EPA has had to modify the manner in which it applies its economic benefit policies to federal entities, thereby creating a situation where federal agencies are, in fact, treated differently than similarly-situated private entities. First, the Agency has significantly altered its theory of economic benefit to eliminate "alternative investment" as the basis for determining that benefit has indeed accrued. Second, unlike in the private sector, an the EPA federal agency enforcement action collects benefit-based penalties from an entity other than that which realizes the gain. Finally, it appears that the EPA is willing to excuse federal agencies from the requirement that economic benefit penalties be paid in cash, rather than offset with supplemental environmental projects. In sum, in order for the EPA to treat federal facilities "just like" private entities in terms of the size of fines, the EPA must apply economic benefit penalty policies "differently."

Even if the EPA can recover economic benefit from federal agency violators, the computer model it uses to calculate such benefit (BEN) is unsound from both an economic and financial standpoint. As such, any penalty figures BEN generates are inherently suspect and should not be relied upon as a basis for penalty assessments in civil enforcement actions.[24] Lieutenant Colonel Jaynes.

18. *Id.*

19. *Id.* at 15.

20. *Id.* at 70.

21. *Id.* at 71.

22. *Id.*

23. *Id.* at 61.

Unexploded Ordnance (UXO): An Explosive Issue?

The recent increase in transition of military ranges to non-military uses has increased public and environmental regulatory agency concern regarding ranges. Much of this concern stems from the identification of UXO and its constituents as possible contributing sources of contamination of groundwater and soils. Making the situation potentially more explosive are EPA Region 1 actions at one of those installations, Massachusetts Military Reservation (MMR), where groundwater contamination has halted live-firing on ranges. This article highlights recent developments in the areas of munitions and ranges that influence the ability of installations to use their ranges.

In 1997, EPA Region 1 asserted the Safe Drinking Water Act (SDWA)[25] as the primary basis for prohibiting the use of lead, propellants, explosives, and demolitions, based on suspicion that ongoing training activities could contaminate the sole-source aquifer underlying the MMR impact area, thereby creating an imminent and substantial endangerment to human health and the environment. The EPA relied upon the SDWA to issue two administrative orders (AOs). These two orders required a complete groundwater study for the area underlying the impact area, provided for extensive EPA participation and oversight of the response action, established a citizens advisory committee to monitor the work, and ordered the cessation of all use of lead ammunition, high explosive artillery and mortars propellants, and demolition of ordnance or explosives (except for UXO clearance). In a third AO, the EPA ordered feasibility studies and removal of contaminated soil. The EPA's actions at MMR have Army-wide implications because other installations have training areas that overlay sole-source aquifers.

The Army has some provisions for dealing with military munitions, such as EPA's Munitions Rule (MR).[26] The MR provides some clarification for the treatment of military munitions by excluding training (including firing, research and development, and range clearance on active and inactive ranges) and materials recovery activities from being classified as waste management activities. The MR also allows the DOD storage and transportation standards to supplant environmental regulations under certain conditions. Additionally, the EPA postponed the decision regarding the status of military munitions on closed, transferred, and transferring (CTT) ranges pending DOD's publication of the Range Rule, which would govern military munitions at those areas. The DOD published the Proposed Range Rule in 1997. The DOD, the EPA, and other Federal Land Managers are currently participating in discussions with the Office of Management and Budget as part of the interagency review process regarding the Draft Final Range Rule, the last step before promulgation of the rule. Publication is expected in January 2001.

Recently, further Army guidance was issued in the *Interim Final Management Principles for Implementing Response Actions at Closed, Transferring, and Transferred Ranges* ("*Management Principles*"), available on the Internet at http://www.dtic.mil/enviroDOD/UXO-Mgt-Principles.pdf. In March 2000, the Deputy Under Secretary of Defense (Environmental Security) and EPA Assistant Administrator for Solid Waste and Emergency Response signed the *Management Principles* as an interim measure effective until DOD issues the final Range Rule. In August 2000, the Army's Assistant Chief of Staff for Installation Management and Deputy Assistant Secretary of the Army (Environment, Safety, and Occupational Health) forwarded the *Management Principles*, along with an associated "Frequently Asked Questions," to the Major Army Commands (MACOMs) for distribution to their field organizations. The MACOMs and field organizations must consider these *Management Principles* in planning and execution of response actions at CTT ranges. Department of Defense and the EPA Headquarters negotiated the *Management Principles* and they have been shared with the states and tribes.

The *Management Principles* indicate that a process consistent with the CERCLA and the *Management Principles* provide the preferred response mechanism to address UXO at a CTT range. Response activities may include removal actions, remedial actions, or a combination of both, when necessary to address explosive safety, human health and the environmental hazards associated with a CTT range. Prior to accommodating any EPA request deemed unsafe (for example, from an explosives safety, occupational health, or worker safety standpoint), unreasonable, or inconsistent with CERCLA, the *Management Principles*, or other DOD or Army policy, installations must resolve those concerns. When necessary, installations should raise unresolved issues or disputes through the chain of command to the Assistant Chief of Staff for Installation Management or through other established mechanisms for resolution.

Installations must provide regulators and other stakeholders an opportunity for timely consultation, review, and comment on all response phases, except for certain emergency response actions. Installations should conduct discussions with local land use planning authorities, local officials, and the public, as appropriate, as early as possible in the response process to determine anticipated future land use.

Those in the field should be advised to follow the requirements set forth in the EPA's MR when dealing with military munitions used in training, testing, materials recovery, and range clearance activities. Until the DOD issues the Final Range Rule, installations must also comply with the *Management Principles* when conducting response actions for munitions and their constituents at CTT ranges. As for active range

24. *Id.* at 91.

25. 42 U.S.C. §§ 300f–300j-26 (2000).

26. 62 Fed. Reg. 6621 (Feb. 1997).

challenges, the Army's Assistant Chief of Staff for Installation Management recently requested that some installations test for explosive contaminants in their drinking water sources and groundwater adjacent and down gradient of impact areas. Clearly, the EPA's actions at MMR have garnered significant attention throughout the Army as it seeks to formulate workable approaches to assessing the costs and risks that this and similar scenarios pose to military training. Lieutenant Colonel Schenck.

Update on Punitive Fines and Federal Facilities

During the past year significant developments have effected notable change in the regulatory landscape of federal facilities. One particular issue that has ripened on the vine involves the authority of environmental regulatory agencies to subject federal facilities to punitive fines. This discussion highlights the recent key events that surround this issue. Moreover, a table at the end of this discussion provides a ready synopsis of punitive fines as they currently apply to the primary media programs.

The 1992 amendments to the Resource Conservation and Recovery Act (RCRA Amendments),[27] authorize the EPA to assess fines for past violations of underground storage tank (UST) requirements. Five years after the enactment of the RCRA Amendments, the EPA began a policy of interpreting the RCRA Amendments so as to impose punitive fines against federal facilities with respect to USTs. From the onset of this policy, military services argued that the RCRA Amendments authorized EPA to impose only fines for hazardous and solid waste provisions in RCRA, but not for the independent federal facilities provisions for USTs. They also began challenging EPA's enforcement actions in litigation before the EPA administrative law judges (ALJs) and asked the Office of the Secretary of Defense (OSD) General Counsel to seek resolution of the issue from the Office of Legal Counsel (OLC) in the Department of Justice (DOJ).

After OSD submitted a request to OLC in April 1999, the services asked for stays of administrative litigation in pending cases. Shortly before a stay was requested in one Air Force case, however, an ALJ rendered a decision upholding DOD's objections. The EPA appealed that decision to the Environmental Appeals Board (EAB). After the OLC decided in June 2000 that the EPA has authority to impose fines for UST violations, the Air Force asked the EAB to uphold the favorable ALJ decision. The EAB did not reach the merits of the dispute, but found that there was no compelling need to set aside the OLC opinion. Installations are now settling pending UST cases.

Whether the limited waiver of sovereign immunity in the Clean Air Act (CAA)[28] allows state regulators to impose penalties against federal facilities continues to be a hotly disputed issue. This situation has been exacerbated by recent cases. In a bizarre ruling last year, the United States Court of Appeals for the 6th Circuit found that the CAA's savings clause for its citizen suits provision contains an independent waiver of sovereign immunity authorizing punitive fines against federal facilities.[29] The DOJ chose not to appeal that case to the Supreme Court because there was no split of authority among the circuits. Instead, the military services anxiously awaited the decision of the United States Court of Appeals for the 9th Circuit on an appeal of a federal district court decision in California that had adopted the United States' position.[30] Instead of addressing the central issue, however, the Ninth Circuit Court held that the case should not have been removed to federal court.[31] The DOJ is now considering whether to pursue the issue before the Supreme Court. Final resolution of this issue is probably several years away. Major Arnold.

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27. 42 U.S.C. §§ 6901–6991(h)7.

28. *Id.* §§ 7401-7671.

29. U.S. v. Tennesse Air Pollution Control Bd., 185 F.3d 529 (6th Cir. 1999), rehearing *en banc* denied without opinion (Nov. 15, 1999).

30. Sacramento Metro. Air Quality Mgmt. Dist. v. U.S., 29 F.Supp.2d 652 (E.D. Cal. 1998).

31. Sacramento Metro. Air Quality Mgmt. Dist. v. U.S., 215 F.3d 1005 (9th Cir. 2000).

Army Authority to Pay Punitive Fine and the Year Authority was Received		
Statute	**Imposed by State**	**Imposed by EPA**
Resource Conservation and Recovery Act (RCRA) [Subtitle C and D only--re hazardous and solid waste] 42 U.S.C. § 6961	Yes--1992	Yes--1992
RCRA [Subtitle I only--re Underground storage tanks] 42 U.S.C. § 6991f	No	Yes--2000[a]
Safe Drinking Water Act (SDWA) 42 U.S.C. § 300j-6	Yes--1996	Yes-1996
Clear Air Act (CAA) 42 U.S.C. § 7418	No[b]	Yes--1997[c]
Clean Water Act (CWA) 33 U.S.C. § 1323	No	No

a. The DOD disputed the EPA's assertion that it has authority to assess fines against federal facilities for UST violations and referred the issue to the Department of Justice (DOJ) in April 1999. On 14 June 2000, the DOJ released an opinion that concluded that amendments to the RCRA in 1992 gave the EPA the authority to assess the UST fines against federal facilities. The issue was also challenged before the EPA's Environmental Appeals Board, who deferred to the DOJ opinion.

b. Many states dispute the United States' position on this, and issue notices of violation that include assessments of fines. This issue was expected to have been settled through litigation in the Ninth Circuit Court of Appeals, but that court recently issued a surprise ruling that the case should not have been removed from state court and remanded without addressing the central issue. The DOJ may appeal to the Supreme Court on the issue of removing cases to federal courts. It will probably be several years before the sovereign immunity issue is settled nationwide. In the interim, installations will continue to assert the position of the United States (i.e., the sovereign immunity defense) except in the four states (KY, OH, MI, TN) of the Sixth Circuit, where the court found that federal facilities must pay penalties imposed by state regulators for the CAA violations.

c. The authority of the EPA to impose fines stems from an amendment to the CAA in 1990. A DOD challenge to that authority was resolved in favor of the EPA in a 1997 opinion by the DOJ.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

October 2000

2-6 October	2000 JAG Annual CLE Workshop (5F-JAG).
2 October-21 November	3d Court Reporter Course (512-71DC5).

Note: The **3d Court Reporter Course** has been **cancelled**.

13 October-22 December	153d Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
30 October-3 November	58th Fiscal Law Course (5F-F12).
30 October-3 November	162d Senior Officers Legal Orientation Course (5F-F1).

November 2000

13-17 November	24th Criminal Law New Developments Course (5F-F35).
27 November-1 December	54th Federal Labor Relations Course (5F-F22).

December 2000

4-8 December	2000 Government Contract Law Symposium (5F-F11).
4-8 December	2000 USAREUR Criminal Law Advocacy CLE (5F-F35E).
4-8 December-	2000 USAREUR Operational Law CLE (5F-F47E).
11-15 December	4th Tax Law for Attorneys Course (5F-F28).

2001

January 2001

2-5 January	2001 USAREUR Tax CLE (5F-F28E).
8-12 January	2001 PACOM Tax CLE (5F-F28P).
8-12 January	2001 USAREUR Contract & Fiscal Law CLE (5F-F15E).
8 January-27 February	4th Court Reporter Course (512-71DC5).
9 January-2 February	154th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
16-19 January	2001 Hawaii Tax CLE (5F-F28H).

17-19 January	7th RC General Officers Legal Orientation Course (5F-F3).
21 January-2 February	2001 JOAC (Phase II) (5F-F55).
29 January-2 February	164th Senior Officers Legal Orientation Course (5F-F1).

February 2001

2 February-6 April	154th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
5-9 February	75th Law of War Workshop (5F-F42).
12-16 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
26 February-2 March	59th Fiscal Law Course (5F-F12).
26 February-9 March	35th Operational Law Seminar (5F-F47).

March 2001

5-9 March	60th Fiscal Law Course (5F-F12).
19-30 March	15th Criminal Law Advocacy Course (5F-F34).
26-30 March	3d Advanced Contract Law Course (5F-F103).
26-30 March	165th Senior Officers Legal Orientation Course (5F-F1).

April 2001

2-6 April	25th Admin Law for Military Installations Course (5F-F24).
16-20 April	3d Basics for Ethics Counselors Workshop (5F-F202).
16-20 April	12th Law for Legal NCOs Course (512-71D/20/30).
23-26 April	2001 Reserve Component Judge Advocate Workshop (5F-F56).
30 April-11 May	146th Contract Attorneys Course (5F-F10).

May 2001

7 - 25 May	44th Military Judge Course (5F-F33).
14-18 May	48th Legal Assistance Course (5F-F23).

June 2001

4-7 June	4th Intelligence Law Workshop (5F-F41).
4-8 June	166th Senior Officers Legal Orientation Course (5F-F1).
4 June-13 July	8th JA Warrant Officer Basic Course (7A-550A0).
4-15 June	6th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
5-29 June	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
6-8 June	Professional Recruiting Training Seminar
11-15 June	31st Staff Judge Advocate Course (5F-F52).
18-22 June	5th Chief Legal NCO Course (512-71D-CLNCO).
18-22 June	12th Senior Legal NCO Management Course (512-71D/40/50).
18-29 June	6th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
25-27 June	Career Services Directors Conference.
29 June-7 September	155th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2001

8-13 July	12th Legal Administrators Course (7A-550A1).
9-10 July	32d Methods of Instruction Course (Phase I) (5F-F70).

16-20 July	76th Law of War Workshop (5F-F42).
16 July-10 August	2d JA Warrant Officer Advanced Course (7A-550A2).
16 July-31 August	5th Court Reporter Course (512-71DC5).
30 July-10 August	147th Contract Attorneys Course (5F-F10).

August 2001

6-10 August	19th Federal Litigation Course (5F-F29).
13 August-23 May 02	50th Graduate Course (5-27-C22).
20-24 August	7th Military Justice Managers Course (5F-F31).
20-31 August	36th Operational Law Seminar (5F-F47).

September 2001

5-7 September	2d Court Reporting Symposium (512-71DC6).
5-7 September	2001 USAREUR Legal Assistance CLE (5F-F23E).
10-14 September	2001 USAREUR Administrative Law CLE (5F-F24E).
10-21 September	16th Criminal Law Advocacy Course (5F-F34).
17-21 September	49th Legal Assistance Course (5F-F23).
18 September-12 October	156th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
24-25 September	32d Methods of Instruction Course (Phase II) (5F-F70).

October 2001

1-5 October	2001 JAG Annual CLE Workshop (5F-JAG).
1 October-20 November	6th Court Reporter Course (512-71DC5).
12 October-21 December	156th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
15-19 October	167th Senior Officers Legal Orientation Course (5F-F1).
29 October-2 November	61st Fiscal Law Course (5F-F12).

November 2001

12-16 November	25th Criminal Law New Developments Course (5F-F35).
26-30 November	55th Federal Labor Relations Course (5F-F22).
26-30 November	168th Senior Officers Legal Orientation Course (5F-F1).
26-30 November	2001 USAREUR Operational Law CLE (5F-F47E).

December 2001

3-7 December	2001 USAREUR Criminal Law Advocacy CLE (5F-F35E).
3-7 December	2001 Government Contract Law Symposium (5F-F11).
10-14 December	5th Tax Law for Attorneys Course (5F-F28).

2002

January 2002

2-5 January	2002 Hawaii Tax CLE (5F-F28H).
7-11 January	2002 PACOM Tax CLE (5F-F28P).
7-11 January	2002 USAREUR Contract & Fiscal Law CLE (5F-F15E).
7 January-26 February	7th Court Reporter Course (512-71DC5).
8 January-1 February	157th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
15-18 January	2002 USAREUR Tax CLE (5F-F28E).

16-18 January	8th RC General Officers Legal Orientation Course (5F-F3).
20 January-1 February	2002 JAOAC (Phase II) (5F-F55).
28 January-1 February	169th Senior Officers Legal Orientation Course (5F-F1).

February 2002

1 February-12 April	157th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
4-8 February	77th Law of War Workshop (5F-F42).
4-8 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
25 February-1 March	62d Fiscal Law Course (5F-F12).
25 February-8 March	37th Operational Law Seminar (5F-F47).

March 2002

4-8 March	63d Fiscal Law Course (5F-F12).
18-29 March	17th Criminal Law Advocacy Course (5F-F34).
25-29 March	4th Contract Litigation Course (5F-F103).
25-29 March	170th Senior Officers Legal Orientation Course (5F-F1).

April 2002

1-5 April	26th Admin Law for Military Installations Course (5F-F24).
15-19 April	4th Basics for Ethics Counselors Workshop (5F-F202).
15-19 April	13th Law for Legal NCOs Course (512-71D/20/30).
22-25 April	2002 Reserve Component Judge Advocate Workshop (5F-F56).
29 April-10 May	148th Contract Attorneys Course (5F-F10).
29 April-17 May	45th Military Judge Course (5F-F33).

May 2002

13-17 May	50th Legal Assistance Course (5F-F23).

June 2002

3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
3-14 June	7th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
3 June-12 July	9th JA Warrant Officer Basic Course (7A-550A0).
4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Legal NCO Management Course (512-71D/40/50).
17-22 June	6th Chief Legal NCO Course 512-71D-CLNCO).
17-28 June	7th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
24-26 June	Career Services Directors Conference.
28 June-6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2002

8-9 July	33d Methods of Instruction Course (Phase I) (5F-F70).
8-12 July	13th Legal Administrators Course (7A-550A1).
15 July-9 August	3d JA Warrant Officer Advanced Course (7A-550A2).
15-19 July	78th Law of War Workshop (5F-F42).
15 July-30 August	8th Court Reporter Course (512-71DC5).
29 July-9 August	149th Contract Attorneys Course (5F-F10).

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).
12 August-May 2003	51st Graduate Course (5-27-C22).
19-23 August	8th Military Justice Managers Course (5F-F31).
19-30 August	38th Operational Law Seminar (5F-F47).

September 2002

4-6 September	2002 USAREUR Legal Assistance CLE (5F-F23E).
9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
9-20 September	18th Criminal Law Advocacy Course (5F-F34).
11-13 September	3d Court Reporting Symposium (512-71DC6).
16-20 September	51st Legal Assistance Course (5F-F23).
23-24 September	33d Methods of Instruction Course (Phase II) (5F-F70).

3. Civilian-Sponsored CLE Courses

2 November ICLE	American Justice: Professional-ism, Ethics and Malpractice Kennesaw State University Center Kennesaw, Georgia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 July annually
New Mexico	prior to 1 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	30 June annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December

Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	End of two-year compliance period
Vermont	15 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt
** Military Must Declare Exemption

For addresses and detailed information, see the March 2000 issue of *The Army Lawyer.*

5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for first submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2000***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2001 (hereafter "2001 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 30 November 2000***. Examinations and writing exercises will be expeditiously returned to students to allow them to meet this suspense.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be allowed to attend the 2001 JAOAC. To provide clarity, all judge advocates who are authorized to attend the 2001 JAOAC will receive written notification. Conversely, judge advocates who fail to complete Phase I correspondence courses and writing exercises by the established suspenses will receive written notification of their ineligibility to attend the 2001 JAOAC.

If you have any further questions, contact LTC Karl Goetzke, (800) 552-3978, extension 352, or e-mail Karl.Goetzke@hqda.army.mil. LTC Goetzke.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2000-2001 Academic Year)

DATE	TRAINING SITE AND HOST UNIT	AC GO/RC GO	SUBJECT	ACTION OFFICER
28-29 Oct	West Point, NY NYARNG		Eastern States JAGC Senior Leadership Workshop	POC: COL Randall Eng (718) 520-2846
11-12 Nov	Bloomington, MN 214th LSO (88th RSC)		Administrative Law; Contract Law	POC: Todd Corbo (612) 596-4753 todd.corbo@us.pwcglobal.com
18-19 Nov	Kings Point, NY 77th RSC/4th LSO		Criminal Law; Operational Law	POC: MAJ Terri O'Brien and CPT Sietz, 77th RSC ObrienT@usarc-emh2.army.mil POC: LTC Ralph M.C. Sabatino (718) 222-2301, 4th LSO
20-21 Nov	San Diego, CA 78th LSO		LSO Commander's Workshop	POC: COL Daniel Allemeier drallemeier@hrl.com
6-7 Jan	Long Beach, CA 63rd RSC, 78th LSO		Criminal Law; International Law	POC: CPT Paul McBride (714) 229-3700 Sandiegolaw@worldnet.att.net
2-4 Feb	El Paso, TX 90th RSC, 5025th GSU		Civil/Military Operations; Administrative Law; Contract Law	POC: LTC(P) Harold Brown (210) 384-7320 harold.brown@usdoj.gov
2-4 Feb	Columbus, OH 9th LSO		Criminal Law; International Law	POC: CW2 Lesa Crites (614) 898-0872 lesa@gowebway.com ALT: MAJ James Schaefer (513) 946-3018 jschaefe@prosecutor.hamilton-co.org
10-11 Feb	Seattle, WA 70th RSC, 6th MSO		Administrative and Civil Law; Contract Law	POC: CPT Tom Molloy (206) 553-4140 thomas.p.molloy@usdoj.gov
24-25 Feb	Indianapolis, IN INARNG		Administrative and Civil Law; Domestic Operations Law; International Law	POC: LTC George Thompson (317) 247-3491 ThompsonGC@in-arng.ngb.army.mil
2-4 Mar	Colorado Springs, CO 96th RSC, NORD/USSPACECOM		Space Law; International Law; Contract Law	POC: COL Alan Sommerfeld (719) 567-9159 alan.sommerfeld@jntf.osd.mil
10-11 Mar	San Franscisco, CA 63rd RSC, 75th LSO		RC JAG Readiness (SRP, SSCRA, Operations Law	POC: MAJ Adrian Driscoll (415) 543-4800 adriscoll@ropers.com
24-25 Mar	Charleston, SC 12th LSO		Administrative and Civil Law; Domestic Operations; CLAMO; JRTC-Training; Ethics; 1-hour Professional Responsiblity	POC: COL Robert Johnson (704) 347-7800 ALT: COL David Brunjes (919) 267-2441
22-25 Apr	Charlottesville, VA OTJAG		RC Workshop	

28-29 Apr	Newport, RI 94th RSC		Fiscal Law; Administrative Law	POC: MAJ Jerry Hunter (978) 796-2143 Jerry.Hunter@usarc-emh2.army.mil ALT: NCOIC-SGT Neoma Rothrock (978) 796-2143
5-6 May	Gulf Shores, AL		Administrative and Civil Law; Environmental Law; Contract Law	POC: CPT Lance W. VonAh (205) 795-1511 Lance.VonAh@usarc-emh2.army.mil ALT: MAJ John Gavin (205) 795-1512 John.Gavin@usarc-emh2.army.mil
19-20 May	St. Louis, MO 89th RSC, 6025th GSU 8th MSO		Legal Assistance; Military Justice	POC: MAJ J. T. Parker (800) 892-7266, ext. 1397

2. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of the TJAGSA Materials Available Through DTIC, see the September 2000 issue of *The Army Lawyer.*

3. Regulations and Pamphlets

For detailed information, see the September 2000 issue of *The Army Lawyer.*

4. Articles

The following information may be useful to judge advocates:

Chad Baruch, *Through the Looking Glass: A Brief Comment on the Short Life and Unhappy Demise of the Singleton Rule*, 27 N. KY. L. REV. (2000).

Jack Wade Nowlin, *The Constituional Limits of Judicial Review: A Structural Interpretive Approach*, 52 OKLA. L. REV. 521 (1999).

5. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (804) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's web page at http://www.jagcnet.arm.mil/tagjsa. Click on directory for the listings.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (804) 972-6264. CW3 Tommy Worthey.

6. The Army Law Library Service

Per *Army Regulation 27-10*, paragraph 12-11, the Army Law Library Service (ALLS) Administrator, Ms. Nelda Lull, must be notified prior to any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: lullnc@hqda.army.mil.

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US Army
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